(1) 00-1074

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRIS NIEMEYER AND JASON NIEMEYER, ET AL.,
Petitioners,

v.

BARRY KAYRELL, INDIVIDUALLY AND AS SUPERINTENDENT OF OROVILLE UNION HIGH SCHOOL DIST., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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January 2, 2001

179 pp

QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment to the United States Constitution required public school officials to censor a religious valedictorian's graduation address of views they considered excessively "sectarian" or "proselytizing?"

PARTIES TO THE PROCEEDINGS

The Petitioners are Chris Niemeyer; Jason Niemeyer; John Niemeyer through his Guardian ad Litem Janet Niemeyer; Justin Hagan through his Guardian ad Litem Connie Hagan; Vanessa Ralston through her Guardian ad Litem Teresa Ralston; Doe I through her Guardian ad Litem Roe I; Doe II through his Guardian ad Litem Roe II; and Doe III through his Guardian ad Litem Roe III.

Petitioners Chris Niemeyer and Jason Niemeyer were Plaintiffs and Appellants in the District Court and Ninth Circuit Court of Appeals. All others were Appellants in the Court of Appeals, having been dismissed by the District Court as lacking standing to bring their claims.

Respondents are Barry Kayrell, individually and as Superintendent of the Oroville Union High School District; Larry Payne, individually and as Principal of Oroville Union High School; Jeff Plotnick, individually and as Vice-Principal of Oroville Union High School; and David Bruce; Roy Fisher; Kenneth Harlan; Susan Neben; and Lillaine Speese, as Members of the Governing Board of Oroville Union High School District. Said Respondents were both Defendants and Appellees below.

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L. Defendants' [Respondents'] Response to Plaintiffs' [Petitioners'] Statement of Undisputed Facts, dated March 18, 1999

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Chris Niemeyer, Jason Niemeyer and various underclassmen attending Oroville High School[1] respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the Court of Appeals' holding in *Cole and Niemeyer, et al. v. Oroville Union High School District, et al.*, 228 F.3d 1092 (9th Cir. 2000), that the Establishment Clause of the First Amendment to the United States Constitution requires Respondents to censor valedictory speeches of religious viewpoints, and that such viewpoint discrimination does not contravene the Free Speech Clause of the First Amendment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *Cole and Niemeyer, et al. v. Oroville Union High School District, et al.*, is reported at 228 F.3d 1092, and is set forth herein as Appendix A. The opinion of the United States

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[1] John Niemeyer through his Guardian Ad Litem Janet Niemeyer, Justin Hagan through his Guardian Ad Litem Connie Hagan, Vanessa Ralston through her Guardian Ad Litem Teresa Ralston, Doe I through her Guardian Ad Litem Roe I, Doe II through her Guardian Ad Litem Roe II, Doe III through her Guardian Ad Litem Roe III. In the spring of 1999, John Niemeyer was an eighth grader who was taking a math class at Oroville High School and expected to matriculate there in the fall; Justin Hagan and Vanessa Ralston were fifth graders who expect to attend Oroville High School; Does I-III were underclassmen at Oroville High School. These students share similar religious beliefs with Chris Niemeyer.

District Court for the Eastern District of California in *Cole and Niemeyer, et al. v. Oroville Union High School District, et al.*, No. CIV S-98-1037, June 10, 1999 is unreported, and appears in Appendix C hereto. The Order After Hearing of the District Court, dated December 14, 1998, dismissing in part Plaintiffs' damage claims in *Cole and Niemeyer, et al. v. Oroville Union High School District, et al.*, No. CIV S-98-1037, from which Petitioners also appealed, was incorporated in the final Judgment in a Civil Case, United States District Court for the Eastern District of California in *Cole and Niemeyer, et al. v. Oroville Union High School District, et al.*, No. CIV S-98-1037, dated June 10, 1999, reproduced herein as Appendix B.

STATEMENT OF JURISDICTION

Petitioners seek review by writ of certiorari from the decision of the Ninth Circuit Court of Appeals entered October 2, 2000. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND REGULATIONS

The relevant provisions of California Education Code Section 48907 are set out herein as Appendix E. The relevant portions of Oroville Union High School District Policy #5145.2, entitled "Students Freedom of Speech/Expression" are set out in Appendix F hereto.

STATEMENT OF THE CASE

A. The Facts of the Case

Petitioners' appeal concerns viewpoint discrimination against a high school valedictorian who sought to address the graduation audience on topics typical to that setting from a religious viewpoint.

Oroville High School ("OHS") graduations are held off school grounds at a field owned by Oroville Union High School District ("District"). 228 F.3d at 1096; Defendants' Response to Plaintiffs' Statement of Undisputed Facts, Appendix L2, ¶ 3; Defendants' Statement of Undisputed Facts, Appendix J10-J11, No. 27. Seniors are not required to attend to obtain their degree or graduate. 228 F.3d at 1096; Appendix L3, ¶ 4.

Traditionally, OHS has requested that the graduating senior with the highest grade point average, the valedictorian, address the audience at commencement. Appx. L5, ¶ 10. For at least the last eight years, the valedictorian has prepared his address and submitted it to the OHS principal for typing and inclusion in a graduation book, which is a script of the entire commencement exercise. Appx. L6, ¶ 14.

Neither OHS nor the District has any policy, written or unwritten, dealing specifically with the content of graduation expression. Appx. L10, ¶ 17. However, in 1984, the District adopted written policy # 5145.2, entitled "Students Freedom of Speech/Expression."[2] That policy provided that:

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[2] *Cf.* California Education Code Section 48907 which appears in Appendix E.

> There should be no interference in the school with these liberties [students' rights to express opinions, to take stands, and to support causes, publicly or privately] or with the students' access to or expression of controversial points of view.... In imposing limitations on student expression for any reason..., the school must ensure that its rules are applied on a nondiscriminatory basis and in a manner designed to assure maximum freedom of expression to the students but which does not endanger health or safety of other students.... The school shall particularly avoid any action placing restraints on ideas prior to their expression ....

Appx. L6-L8, ¶ 15; Appx. F1, F3.

Indeed, prior to Petitioner Chris Niemeyer's 1998 graduation, the only editing of commencement expression by the OHS principal was grammatical. Appx. L11, ¶ 20.

In late May of 1998, Petitioner Chris Niemeyer, the valedictorian that year, submitted an address to OHS Principal Larry Payne, the final version of which appears in Appendix G hereto. Appx. L12-L13, ¶ 24. Niemeyer's speech was entitled, "The Key to Success" and answered the questions: "Who are we?," "Why are we here?" and "Where are we going?" from his perspective as a student and as a Christian. Appx. G. In closing, Niemeyer encouraged his audience to "accept God's love and grace." Appendix at G3.

OHS Principal Payne objected to Niemeyer's address, stating that there were "religious overtones" to it. Appx. L13, ¶ 25. District Superintendent Barry Kayrell rejected the address because

it reflected a "Christian viewpoint." Appx. L14, ¶ 30. Kayrell told Chris Niemeyer that if he did not change his speech to remove his religious references, he would not be allowed to speak at graduation. Appx. L15, ¶ 31.

At the June 5, 1998 graduation ceremony, all four student speakers expressed their life's philosophy, attempted to give the graduation meaning, and exhorted the audience on how to approach life, stress and the future. Record on Appeal in the United States Court of Appeals for the Ninth Circuit, at 35-45. Because Chris Niemeyer could not, in good conscience, further edit[3] his address, he was not allowed to speak at his graduation. Appx. L15, ¶¶ 33, 34.

B. The Courts Below.

Petitioner Chris Niemeyer, upon learning of OHS' position, brought a civil rights action pursuant to 42 U.S.C. §1983 seeking both injunctive relief and damages.[4] On June 5, 1998, graduation day for Petitioner Chris Niemeyer, the District Court denied the

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[3] In an effort to satisfy the District, Chris Niemeyer edited his proposed address to add a disclaimer. The first version appears at footnote 2 of the District Court's Decision, Appx. C, at C2-C4. The final version, with the proposed disclaimer, is set out in Appx. G.

[4] Claims were brought on behalf of Petitioner Niemeyer and Ferrin Cole, the lead plaintiff and appellant below. Cole's claims arose from Respondents' exercise of editorial control over the religious content of his proposed invocation on behalf of the senior class, an issue that is not pursued in this petition in view of its apparent disposition in *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000).

motion for a temporary injunction. On December 14, 1998, the District Court dismissed Petitioner Niemeyer's damage claims, holding that all Defendants were protected by qualified immunity. *See* Appx. D, Order After Hearing dated December 14, 1998.

On March 8, 1999, the District Court denied Petitioners' Motion to add John Niemeyer, then in eighth grade, and Justin Hagan and Vanessa Ralston, who were younger students expecting to attend OHS. The Court permitted Petitioners to add Jason Niemeyer to the action as he had earned the right to deliver the valedictorian's address for the OHS Class of 1999's graduation. Appx. C13, C27. *See* Second Amended Complaint, Appx. H hereto.

On April 1, 1999, Petitioners were given leave to file a Third Amended Complaint, which sought again to add John Niemeyer (who by this time was taking math classes at OHS two years ahead of his class); Does I-III, underclassmen at OHS and Janet Niemeyer and Roes I-III, both as Guardians ad Litem and in their own right as those who would be in attendance at OHS graduations. *See* Third Amended Complaint, Appx. I hereto.

By its final order of June 10, 1999, the Court dismissed all Petitioners except Jason Niemeyer for want of standing, denied Plaintiffs' Motion for a Preliminary Injunction and Summary Judgment and granted Respondents' Motion for Summary Judgment. Appx. C. Petitioners filed timely Notice of Appeal to the Ninth Circuit Court of Appeals pursuant to Fed. R. App. Proc. 4(a)(1), on July 8, 1999.

The Ninth Circuit affirmed the District Court's decision. Judge Fisher, writing for Judges Schroeder and Hawkins, concluded that

the Petitioners' equitable claims were moot as Petitioners Chris Niemeyer and Jason Niemeyer, having graduated, could not assert the *jus tertii* rights of future graduation speakers. 228 F.3d at 1099; A10-A11. The court also upheld the dismissal of other parties because "of the highly speculative assumption that a student seeking to give a sectarian speech or prayer will be chosen as valedictorian or salutatorian or will be elected by classmates to deliver an invocation." 228 F.3d at 1100; A13-A14.[5]

Applying his view of this Court's reasoning in *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266 (2000), Judge Fisher found that, because of District control of the graduation, "an objective observer, familiar with the District's policy and its implementation would have likely perceived that the speech carried the District's seal of approval." 228 F.3d at 1103; A20. Because Petitioner Chris Niemeyer's speech was "proselytizing", it was, "no less than prayer, [] a religious practice." 228 F.3d at 1104 (emphasis supplied) (citing *Santa Fe, supra*, 530 U.S. at __, 120 S.Ct. at 2278; A21. Simply listening to such a speech could signal adherence to its ideas, the Court reasoned. *Id.* Therefore, by allowing Petitioner Chris Niemeyer to approach "The Key to Success" from a religious viewpoint at graduation, Respondents may have "compelled a dissenter's implicit participation in the proselytizing" and thereby violated the Establishment Clause. *Id.*;

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[5] Petitioners include potential future graduation speakers John Niemeyer, Justin Hagan, Vanessa Ralston, and Does I through III. Although said Petitioners' claims need not be addressed for the Court to reach the merits of the question presented herein, they are included herein in the event the Court elects to address the issue of standing or that of the availability of equitable relief in the context of a public school graduation ceremony.

A21.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that the Court should grant their Petition for the following reasons:

A. The decision of the Ninth Circuit Court of Appeals is in direct conflict with the well-reasoned decision of the Eleventh Circuit in *Chandler v. James*, 230 F.3d 1313 (11th Cir. 2000), which interpreted the Supreme Court's opinion in *Santa Fe v. Doe* not to mandate censorship of the public expression of religious views of public school students. Petitioners' appeal offers the Court an opportunity to balance its decision in *Santa Fe* and provide appropriate perspective on the free speech rights of public school students.

B. This Court's religion clause precedents have been displaced by the Ninth Circuit. In applying the Establishment Clause, the Ninth Circuit based its decision in material part upon the fact that the listeners were invited to establish a relationship with God, speech the Court of Appeals labeled the "religious exercise" of "proselytizing." *Cf. Lee v. Weisman*, 505 U.S. 577, 586 (1992) (terming graduation prayer a state-directed "formal religious exercise"). In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court refused to accept the contention that a student invitation to establish a relationship with God was subject to a less favored First Amendment status than non-proselytizing speech. The Ninth Circuit's view runs directly counter to this Court's historical treatment of religious invitations as fully protected speech. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940) (street

preaching and proselytization accorded protected status as forms of speech); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (preaching and worship accorded protected status as speech); *Widmar v. Vincent*, 454 U.S. 272 (1981) (same).

A. The Decision of the Ninth Circuit Directly Conflicts with the Recent Decision of the Eleventh Circuit Court of Appeals in *Chandler v. Siegelman*.

In *Chandler v. James*, the Eleventh Circuit considered an injunction which prohibited all "devotional speech," including prayer, in situations which were not purely private, including student speech over the public address system. Further, the injunction required school officials to forbid students from engaging in devotional speech while in school or at school related events. *Chandler v. James*, 180 F.3d 1254, 1257 (11th Cir. 1999) (*Chandler I*). Vacating the preliminary injunction, the Eleventh Circuit held that "because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech clauses of the Constitution." *Chandler I* at 1261. A Petition for Writ of Certiorari having been filed with this Court on June 26, 2000, this Court granted the petition, vacated the Judgment of the Eleventh Circuit and remanded for further consideration in light of *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *Chandler v. Siegelman*, 120 S.Ct. 2714 (2000).

On remand, the Eleventh Circuit concluded that its decision in *Chandler I* was not in conflict with *Santa Fe*. Drawing a line of demarcation between the corporate public "religious exercise" condemned in *Santa Fe* and personal religious expression by public school students, the Court of Appeals concluded:

> *Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent.

Chandler v. Siegelman, 230 F.3d 1313, 1315 (2000) (emphasis in original). The Eleventh Circuit observed that in *Santa Fe*, this Honorable Court was careful to point out that "not every message delivered [in a graduation context] is the government's own" (230 F.3d at 1316, quoting *Santa Fe,* 120 S.Ct. at 2279 [sic: 2275]), and that the Court did not "obliterate the distinction between State speech and private speech in the school context." *Ibid.* The Eleventh Circuit enunciated this rule as follows:

> So long as the prayer is *genuinely student initiated* and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and protected.

230 F.3d at 1317 (emphasis in original).

In contrast, the Ninth Circuit, applying its view of the rule in *Santa Fe*, held that the Establishment Clause *mandated* that Respondents review and censor Petitioners' valedictory speech of "proselytizing" and "sectarian" references. 228 F.3d at 1103; A21-A24. The District, far from "actively or surreptitiously encouraging" Petitioner Chris Niemeyer to approach his valedictory topic from a religious viewpoint, *cf. Chandler*, 230 F.3d at 1317, actually discriminated against him for doing so. Under the rule in the Eleventh Circuit, because Chris Niemeyer's address was genuinely student-initiated, it would be characterized as private

speech and the District's discrimination deemed unconstitutional. Yet the Ninth Circuit held, effectively, that any student speech at graduation is governmental speech and that the District's discrimination was required by the demands of the Establishment Clause.

Accordingly, in Alabama, a student, so long as he receives no encouragement from school officials, may approach his graduation topic from a religious viewpoint; in California, officials must affirmatively discourage a student's desire to make religious references, to the point of exercising prior restraint on the address if the student refuses to accede to the censorship of his or her religious viewpoint. Petitioners believe the line of demarcation between private and public student religious speech drawn by the Eleventh Circuit is the constitutionally required line, and respectfully request that this Court grant their petition for a writ of certiorari to resolve the conflict between the Eleventh and Ninth Circuits in this critically important area of First Amendment jurisprudence.

Petitioners further submit that this case provides the Court with a much-needed opportunity to clarify and balance the law regarding student speech after *Santa Fe*. That *Santa Fe* did not delineate the scope of the rights of public school students with sufficient clarity is amply demonstrated by the divergent readings of the case in the Eleventh and Ninth Circuits. The question presented in Petitioners' appeal offers the Court the opportunity on a clear record to address the question of under "what circumstances religious speech in schools can be considered private, and, therefore, protected." *Chandler v. James*, 230 F.3d at 1263.

The Supreme Court has regularly affirmed that student religious speech at school facilities does not violate the Establishment Clause.

Such use does not "confer any imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. at 274. *See also Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech, that it merely permits on a nondiscriminatory basis.... The proposition that schools do not endorse everything they fail to censor is not complicated."); *Lee v. Weisman*, 505 U.S. at 598-99 ("We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices and religious persons will have some interaction with the public schools and their students.") As the Court observed in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995):

> More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad reaching government programs neutral in design.... The Court of Appeals' apparent concern that *Wide Awake*'s [a Christian student publication] religious orientation would be attributable to the University is not a plausible fear and there is no real likelihood that the speech in question is being either endorsed or coerced by the State.

515 U.S. at 839.

Focusing near-sightedly on *Santa Fe*, the Ninth Circuit ignored this considerable weight of authority. Indeed, in *Santa Fe*, the Court limited its opinion to "institutional practices that

unquestionably violated the Establishment Clause" (120 S.Ct. at 2282) and did not paint with so sweeping a brush as did the Ninth Circuit here. 120 S.Ct. at 2275 ("Of course, not every message delivered under such circumstances is the government's own."). *Santa Fe* offers direction as to school policies and practices which fall afoul of the Establishment Clause. This case, if accepted by this Honorable Court, would allow the Court to clarify and confirm its established precedents regarding student free speech rights in light of *Santa Fe*. For this reason, Petitioners respectfully request that the Court grant their petition.

B. The Decision of the Ninth Circuit Court of Appeals Disregards this Court's Numerous Decisions Protecting Religious Invitations as First Amendment Speech and Prohibiting Viewpoint Discrimination Against Religious Speakers.

The Ninth Circuit characterized Petitioner Chris Niemeyer's valedictory address as "sectarian, proselytizing." *Cole*, 228 F.3d at 1095; A21. It then reasoned that, because proselytizing is a religious activity, Niemeyer's address forced the audience to engage in a "religious activity" and, thereby, violated the Establishment Clause. 228 F.3d at 1104; A22. The Court in *Rosenberger* flatly rejected this analysis.

In *Rosenberger*, a student publication requested, but was denied, indirect funding for a Christian periodical called *Wide Awake*. 515 U.S. 825-827. The purpose of *Wide Awake* was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. Each issue of *Wide Awake* invited its readers to accept Jesus Christ as

their savior. *Wide Awake*'s essays on secular topics also invited students to establish a relationship with Christ. *Id.* The dissent, concerned about the state funding of religion, concluded that *Wide Awake* was nothing other than "the preaching of the word." *Id.* at 867-68.

Like Judge Fisher, the dissenters in *Rosenberger* believed that *Wide Awake*'s speech, by inviting students to accept Christ as their savior, left the permissible realm of discussing secular subjects from a Christian perspective and entered the forbidden world of religious teaching. In their opinion, the state funding of *Wide Awake* violated the Establishment Clause.

The majority of the Supreme Court rejected the notion that *Wide Awake*'s speech (*e.g.*, advising students that in order to overcome eating disorders or racism they needed a personal relationship with God) amounted to religious instruction and the university's actions thereby considered a content-based, rather than a viewpoint-based, restriction. Rather, the Supreme Court held that *Wide Awake* presented a Christian perspective on how to overcome racism and eating disorders. Justice Kennedy opined that "[r]eligion may be a vast inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.

The Ninth Circuit has embraced the *Rosenberger* dissent's logic. It was the "proselytizing" nature of his valedictory address, Judge Fisher opined, which removed the speech from the sphere of Petitioner Chris Niemeyer's private, personal expression and caused the address to be deemed government speech in violation of the Establishment Clause:

> The requirement that religion be left to the private sphere is the product of a well-documented and turbulent history, demonstrating that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." This danger is most apparent here, where allowing the students to engage in sectarian prayer and proselytizing as part of the graduation ceremony would amount to government sponsorship of, and coercion to participate in, particular religious practices.

228 F.3d at 1104 (quoting *Lee*, 505 U.S. at 591-92).

The Ninth Circuit's determination that the Establishment Clause required Respondents to restrict Petitioners' religious "proselytizing" speech as a state-directed "religious exercise" within the meaning of *Lee* runs directly counter to the Supreme Court's historic protection of preaching and religious invitations as fully protected First Amendment free speech activity. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940) (street preaching and proselytization accorded protected status as forms of speech); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (preaching and worship accorded protected status as speech); *Widmar v. Vincent*, 454 U.S. 272 (1981) (same). Petitioners accordingly respectfully request that this Court grant certiorari to rectify the Ninth Circuit's failure to follow *Rosenberger* and other relevant Supreme Court precedent.

CONCLUSION

Oroville Union High School District discriminated against Petitioner Chris Niemeyer because of the religious viewpoint he

took in his valedictory address. The Ninth Circuit has misread applicable precedent and sanctioned the District's discrimination. The Court of Appeals' view is contrary to the decisions of this Court, the Eleventh Circuit and to the Court's historical preservation of the right of religious speech, one of the most cherished liberties protected by the Bill of Rights.

For the reasons stated herein, Petitioners respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and consider the question presented herein.

Respectfully submitted this 2nd day of January, 2001.

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FERRIN COLE; CHRIS NIEMEYER; and JASON NIEMEYER through his Guardian ad Litem Janet Niemeyer,

Plaintiffs-Appellants,

and

JOHN NIEMEYER through his Guardian ad Litem Janet Niemeyer; JANET NIEMEYER, individually and as a Taxpayer; JUSTIN HAGAN through his Guardian ad Litem Connie Hagan; VANESSA RALSTON through her Guardian ad Litem Teresa Ralston; DOE I through her Guardian ad Litem ROE I; DOE II through his Guardian ad Litem ROE II; DOE III through his Guardian ad Litem ROE III; ROE I, individually and as a Taxpayer; ROE II, individually and as a Taxpayer; ROE III, individually and as a Taxpayer,

Appellants,

v.

OROVILLE UNION HIGH SCHOOL DISTRICT; BARRY KAYRELL, individually and as Superintendent of

No. 99-16550
D.C. No.
CV-98-01037-LKK
OPINION

the Oroville Union High School District; LARRY PAYNE, individually and as Principal of Oroville Union High School; JEFF PLOTNICK, individually and as Vice-Principal of Oroville Union High School; DAVID BRUCE; ROY FISHER; KENNETH HARLAN; SUSAN NEBEN; LILLAINE SPEESE,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California
Lawrence K. Karlton, Chief Judge, Presiding

Argued and Submitted
June 12, 2000 — Sacramento, California

Filed October 2, 2000

Before: Mary M. Schroeder, Michael Daly Hawkins and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

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OPINION

FISHER, Circuit Judge:

Ferrin Cole and Chris Niemeyer were students at Oroville High School ("Oroville") who graduated in 1998. They claim the Oroville Union High School District ("District") violated their freedom of speech by refusing to allow Niemeyer to give a sectarian, proselytizing valedictory speech and Cole to give a sectarian invocation at their graduation. We conclude the students' equitable claims are moot because Niemeyer and Cole have graduated, and their damage claims fail because the District officials' actions were reasonably taken to avoid violating the Establishment Clause of the First Amendment. As to the other parties who were added to the students' lawsuit - Chris Niemeyer's brother, Jason, and various Oroville students, parents and others - we conclude they lack standing either because they, too, have graduated or because the likelihood of their being selected to speak at a graduation or their attending a future graduation where some student speaker will attempt to offer a sectarian speech or

invocation is too speculative to satisfy the injury-in-fact requirement of Article III. We thus affirm the district court's summary judgment in favor of all appellees.

FACTUAL AND PROCEDURAL BACKGROUND

Every year, Oroville High School conducts a formal graduation ceremony. The program for the event, as determined by the District, consists of welcoming remarks and the introduction of the District board of trustees and superintendent by the school principal, the singing of the National Anthem and a flag salute, a spiritual invocation delivered by a student chosen by a vote of his or her classmates, vocal selections, graduation speeches by the valedictorian and salutatorian, presentation of the class and diplomas, presentation of the class advisors, one or two farewell speeches and a recessional. Under a District policy instituted sometime around 1985, all student speeches and invocations for graduation are reviewed by the principal, who has the final say regarding their content. Due to increasing concern about the content of graduation speeches, Oroville's principal in recent years has reviewed the content of speeches and invocations to ensure they were not offensive or denominational. Until the class of 1998 graduation, the principal had needed to change the content of speeches only for grammatical errors. Although Oroville's policy does not specifically enumerate what types of content are prohibited, faculty advisors assisting in planning the 1998 graduation repeatedly told Cole and Niemeyer to make their presentations "nondenominational" and inclusive of all beliefs. Oroville graduation ceremonies are held at a football field owned by the District and are paid for in part with District funds. Oroville plans the graduation program and administers the ceremony. Significantly, the principal has supervisory authority over all aspects of the ceremony. The

District requires all students to sign a contract obligating themselves to act and dress in accordance with school directions at the graduation ceremony. A student does not have to attend the ceremony to obtain a diploma. In the Fall of 1997, Niemeyer was informed that he was co-valedictorian of his class at Oroville. In April 1998, Cole was chosen by a vote of his classmates to offer an invocation at the graduation. Both Cole and Niemeyer were late in submitting early drafts of their graduation presentations for review by Oroville faculty advisors and the principal. Although the graduation ceremony was scheduled for June 5, 1998, Niemeyer did not share his speech with advisors or the principal until May 28, 1998, and Cole did not submit his invocation until June 2. Niemeyer stated he did not submit his speech to his faculty advisors for review of the speech's content "because I know they don't hold the same convictions that I do as far as faith." When Cole and Niemeyer finally submitted their proposed remarks for review by the principal's office, the principal told them to tone down the proselytizing and sectarian religious references. They were each advised to change their presentations to make them nondenominational. Niemeyer submitted a second draft of his speech, which included all of the original proselytizing and religious references to Jesus, and the principal informed him the speech was still unacceptable. The principal notified the District's superintendent and faxed him a copy of Niemeyer's speech. The superintendent consulted with the District's legal counsel, and agreed with the principal's decision to reject Niemeyer's speech because of its religious content. The superintendent and principal also discussed Cole's invocation shortly after Cole submitted it. The superintendent again obtained advice of counsel that Cole's invocation was impermissible sectarian prayer and agreed with the principal's decision to reject Cole's proposed invocation. The superintendent met with Cole and Niemeyer to try to persuade

them to delete the sectarian references from their proposed presentations by making them aware the graduation was a District-sponsored event for which the District was ultimately responsible. Nonetheless, Cole and Niemeyer refused to compromise, and on June 4 they filed suit in district court, under 42 U.S.C. §§ 1983, to obtain a temporary restraining order preventing the school from denying them the opportunity to present their unedited remarks at graduation. The district court denied their motion for lack of time to consider the complex issue. Cole and Niemeyer attended the June 5 graduation and Niemeyer attempted to deliver his unedited speech, but the principal refused to allow him to do so. Niemeyer's final proposed speech included a statement that he was going to refer to God and Jesus repeatedly, and if anyone was offended, they could leave the graduation. Niemeyer's proposed speech was a religious sermon which advised the audience that "we are all God's children, through Jesus Christ' [sic] death, when we accept his free love and saving grace in our lives," and requested that the audience accept that "God created us" and that man's plans "will not fully succeed unless we pattern our lives after Jesus' example." Finally, Niemeyer's speech called upon the audience to "accept God's love and grace" and "yield to God our lives." Cole's proposed invocation referred repeatedly to the heavenly father and Father God, and concluded "We ask all these things in the precious holy name of Jesus Christ, Amen."

In December 1998, the district court heard the District's motion to dismiss all of the appellants' claims. The district court granted the District's motion to dismiss all of the claims against the District itself and the damage claims against District officials in their official capacities because the District was immune from suit under the Eleventh Amendment. The court also dismissed the damage claims against District officials in their individual capacities because

it concluded the officials' decisions were protected by qualified immunity. However, it denied the motion to dismiss the injunctive claims against District officials in their official capacities under the rule of *Ex Parte Young*, 209 U.S. 123 (1908).

In early 1999, the appellants filed an amended complaint, including as parties Chris Niemeyer's brother, Jason - who had been chosen as valedictorian of the Oroville class of 1999 and planned to give a sectarian speech - as well as other students to secure standing given that both Cole and Chris Niemeyer had already graduated. The district court held that only Jason Niemeyer had standing to pursue the remaining injunctive claims.[1] Shortly thereafter, the appellants amended their complaint once more, adding a number of other students at Oroville, parents of students at Oroville and other persons who would likely attend Oroville graduations in the future. In June 1999, the district court again concluded only Jason Niemeyer had standing to bring a claim for injunctive relief, denied the plaintiffs' motion for a preliminary injunction and granted summary judgment in the defendants' favor on all claims. Jason Niemeyer has since graduated from Oroville High School, and presumably did not give his proposed sectarian speech.

DISCUSSION

We review for abuse of discretion a district court's decision to deny a preliminary injunction. *See Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725,

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1 Because the district court did not reject Cole's and Chris Niemeyer's standing to bring the damage claims, Jason Niemeyer was added as a party only to the injunctive claim.

732 (9th Cir. 1999). We review de novo a district court's grant of summary judgment. *See Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). Viewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in its favor, we must determine "whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Id.*; *accord Berry v. Valence Technology, Inc.*, 175 F.3d 699, 703 (9th Cir.), *cert. denied*, 145 L. Ed. 2d 409, 120 S. Ct. 528 (1999). Mootness and standing are questions of law we review de novo. *See Wade v. Kirkland*, 118 F.3d 667, 669 (9th Cir. 1997) (mootness); *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1057 (9th Cir. 1996) (standing).

I. Mootness and Standing

The appellants argue that Cole and Chris and Jason Niemeyer each has a live case or controversy for injunctive relief and damages related to the District's policy of refusing to permit sectarian, proselytizing speeches as part of the Oroville graduation. They rely on the "capable of repetition, yet evading review" exception to mootness and the third-party standing doctrines of First Amendment overbreadth and *jus tertii*. They argue further that the additional Oroville students have standing to bring suit because they may present valedictory speeches or invocations in the future and thus the District's policy will infringe upon their freedom of speech. Finally, they argue that the parents and additional students have standing to bring First Amendment free speech and establishment clause claims as prospective participants or attendees at future graduations. With the exception of Cole's and Niemeyer's damage claims, which we discuss below in the context of qualified immunity, we disagree with all of appellants'

arguments.

A. Whether the Claims Brought by Cole and Chris and Jason Niemeyer are Moot

[1] As the Supreme Court has recently noted, both standing and mootness are jurisdictional issues deriving from the requirement of a case or controversy under Article III. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 703-04, (2000); *see also Blair v. Shanahan*, 38 F.3d 1514, 1518 (9th Cir. 1994) ("'Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case . . . .'" (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987))). It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy. *See Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc). Thus, this court has no jurisdiction to entertain the claims for injunctive relief brought by Cole and Chris and Jason Niemeyer unless an exception to mootness applies.

[2] The "capable of repetition, yet evading review" exception to mootness applies only when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *See Spencer v. Kemna*, 523 U.S. 1, 17 (1998); *Madison Sch. Dist.*, 177 F.3d at 798. In *Madison School District*, we held that this exception did not apply to a student's Establishment Clause challenge to a school district's graduation prayer policy because the

student had graduated, and thus would "never again be compelled to participate in a prayer at his or her high school graduation ceremony." 177 F.3d at 799. Similarly, as graduates of Oroville, Cole and Chris and Jason Niemeyer will never again be required to omit sectarian references from their Oroville graduation presentations. This case is therefore different from *Lee v. Weisman*, 505 U.S. 577 (1992), in which the Supreme Court concluded that, although the student who objected to the graduation prayer at her middle school had herself graduated, the Court had "a live and justiciable controversy" before it because she was enrolled as a high school student in the same district and it appeared "likely, if not certain, that an invocation and benediction [would] be conducted at her high school graduation." *Id.* at 584. Thus, Cole's and the Niemeyers' injunctive claims are moot.[2]

The appellants try to avoid the jurisdictional defect in the injunctive claims of Cole and Chris and Jason Niemeyer by asserting that they present a live controversy under the third-party standing doctrines of First Amendment overbreadth and *jus tertii*. Appellants' claim is more properly characterized as an overbreadth claim than as *jus tertii* because the appellants base their third-party claim on a theory that the District might in the future apply its policy to infringe the rights of students at Oroville, not that a single application of the District's policy threatens their rights as well as those of a third-party.[3] Nevertheless, whichever theory of third-

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2 There is no allegation that either the voluntary cessation of harmful conduct or collateral legal consequences exceptions to mootness applies. *Cf. Madison Sch. Dist.*, 177 F.3d at 799 (discussing those exceptions in the graduation prayer context).

3 *Compare United States Dep't. of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (concluding *jus tertii* standing is present where

party standing applies, Cole and Chris and Jason Niemeyer can no longer sustain such a claim.

[3] Under the doctrine of *jus tertii*, a plaintiff can invoke the rights of third parties who are not before the court only if that plaintiff has "a sufficiently concrete interest in the outcome of the[ ] suit to make it a case or controversy subject to a federal court's Art. III jurisdiction . . . ." *Singleton v. Wulff*, 428 U.S. 106, 112, (1976); *accord Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see also* Note, *Standing to Assert Constitutional jus tertii*, 88 Harv. L. Rev. 423, 429 (1974) ("Because the judiciary's primary role in judicial review is to adjudicate the rights of the private parties before it, the mere fact that the constitutional rights of third parties may be in jeopardy provides no justification for judicial intervention." (footnote omitted)). Similarly, only if he presents a "case or controversy, [may] a litigant . . . challenge a statute by

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"enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)"), *with Broadrick v. Oklahoma*, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) (holding that, under the overbreadth doctrine, "litigants, . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *see generally* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Court and The Federal System* 188 (4th ed. 1996) (distinguishing *jus tertii* standing from overbreadth challenges); *Note, Standing to Assert Constitutional jus tertii*, 88 Harv. L. Rev. 423, 423-24 (1974) (same).

showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 634 (1980) (emphasis added); *accord Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975) (explaining that, in order to have overbreadth standing, a person must have "a 'claim of specific present objective harm or a threat of specific future harm,'" and concluding that this requirement is met "where there can be no doubt concerning the appellant's personal stake in the outcome of the controversy" (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972))). In short, a litigant cannot sustain an overbreadth or *jus tertii* claim if he no longer has a personal interest in the outcome which itself satisfies the case or controversy requirement. *See Howard v. City of Burlingame*, 937 F.2d 1376, 1381 n.7 (9th Cir. 1991) (noting that litigant's facial overbreadth challenge to city zoning ordinance requiring special permits for radio antennas over 25 feet became moot when the city granted his permit to erect such an antenna).

Although a student's graduation moots his claims for declaratory and injunctive relief against school officials, it does not moot his damage claims. *See Madison Sch. Dist.*, 177 F.3d at 798. Thus, we must address the damage claims brought by Cole and Chris Niemeyer and determine whether the District officials are entitled to qualified immunity for their decisions to refuse to allow these students to give a sectarian speech or prayer as part of the Oroville graduation ceremony.[4] Before we reach that question, we

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4 The district court correctly concluded it did not have jurisdiction over the appellants' damage claims against the District and District officials in their official capacities, because California school districts are state agencies and thus immune from damage suits under the Eleventh Amendment. *See Belanger v. Madera Unified Sch. Dist.*,

turn to the issue of whether the other appellants have standing to sustain the claims for injunctive relief.

B. Whether Other Students, Parents and Others Likely to Attend Future Graduations Have Standing

[4] Appellants argue that the other students, parents of Oroville students and others likely to attend future graduations joined in the third amended complaint have standing to bring a claim to enjoin the school from prohibiting sectarian speeches and prayers as part of the graduation ceremony. This argument fails because any injury to these parties is too speculative to satisfy the injury-in-fact requirement of Article III.

[5] Article III standing requires an injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). In the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury. *See Lyons*, 461 U.S. at 110-11. In *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994) (per curiam), we held that a company unlawfully denied the opportunity to compete for a cable franchise lacked standing to bring damage claims against the city for profits the company would have received had it been awarded a franchise. *Id.* at 1333-34. We concluded the alleged injury was too uncertain because it depended on the "very speculative assumption" that the

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963 F.2d 248, 251-54 (9th Cir. 1992); *see also Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 71, (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.").

company would have received the franchise as the most qualified competitor and "would have built and operated a profitable cable franchise . . . if it had only been given the chance." *Id.* at 1334. Similarly, the other students, parents and others likely to attend future Oroville graduations lack standing because the likelihood that they will suffer a future injury depends upon the highly speculative assumption that a student seeking to give a sectarian speech or prayer will be chosen as valedictorian or salutatorian, or will be elected by classmates to deliver an invocation.[5] This threat of injury is neither real nor immediate. *Cf. Eggar v. Livingston*, 40 F.3d 312, 316-17 (9th Cir. 1994) (holding that plaintiffs alleging city had policy of imprisoning indigent defendants without appointing counsel did not have standing to bring declaratory or injunctive claims because the likelihood that they would suffer future injury relied on a "'chain of speculative contingencies'" (quoting *Nelsen v. King County*, 895 F.2d 1248, 1252 (9th Cir. 1990)).

II. Whether District Officials are Entitled to Qualified Immunity

We now turn to the merits of the damage claims brought by

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5 The appellants did not pursue their claim of taxpayer standing before this court and have thus waived the issue. *See Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir. 1996). Nevertheless, their claims of taxpayer standing would fail because the appellants have not identified tax dollars spent solely on the valedictory speech or the invocation or on the District's decision to refuse to allow sectarian speech at its graduation ceremonies. *See Madison Sch. Dist.*, 177 F.3d at 794; *see also id.* (concluding that taxpayer standing to challenge a particular graduation activity cannot be sustained by tax dollars spent on "ordinary costs of graduation that the school would pay whether or not the ceremony included [the challenged event]").

Cole and Chris Niemeyer. Cole and Niemeyer argue the District officials violated their clearly established right to speak at the Oroville graduation without content- or viewpoint-based restrictions on their speech. They contend the District's graduation ceremony is a public or limited public forum, and thus the District infringed their freedom of speech by discriminating against their presentations on the basis of their sectarian viewpoints. We disagree. When government officials assert the defense of qualified immunity to an action under 42 U.S.C. §§ 1983, a court evaluating the defense must first determine whether the plaintiff has alleged the deprivation of a constitutional right and, if so, then determine "'whether the right was clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1265 (9th Cir. 1999).[6] Thus, we must decide whether the District officials infringed the students' freedom of speech by refusing to allow them to give a sectarian speech or prayer as part of the Oroville graduation ceremony. We conclude the District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was

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6 Cole and Chris Niemeyer also alleged they were denied due process when the District refused to allow them to give a sectarian speech or prayer at the graduation ceremony without a hearing as required by the District's policy on student freedom of speech. Even if the District's policy creates an entitlement cognizable under the Due Process Clause, this claim fails because the policy only requires a hearing upon request of the student, and neither student requested such a hearing.

necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe*, __ U.S. __, 120 S. Ct. 2266 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995) (analyzing whether a university's viewpoint discrimination was excused by the necessity of complying with the Establishment Clause); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); *see also Arkansas Educ. Television Comm'n. v. Forbes*, 523 U.S. 666, 677 (1998) (noting that strict scrutiny of exclusion of speech in a government forum requires that the exclusion be "'necessary to serve a compelling state interest and the exclusion [be] narrowly drawn to achieve that interest.'" (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985))). In *Santa Fe*, the Supreme Court held that a school district policy authorizing a student selected by a vote of fellow students to deliver a nonsectarian and nonproselytizing "statement or invocation" to solemnize varsity football games violated the Establishment Clause. 120 S. Ct. at 2273 n.6, 2283. The Court rejected the argument that the student's prayer was private speech, because not only did the school district authorize the invocation through its policy and allow the invocation to be held on government property at a government-sponsored school-related event, it also exercised control over the invocation by placing restrictions on its content, allowing only selected students to give the invocation and broadcasting the invocation over the school's public address system. *See id.* at 2275-78. The Court reasoned that the district's control over and entanglement with the invocation not only would cause an objective observer to perceive the district endorsed the religious message of the invocation, but

also constituted an actual endorsement of religion in public schools. *See id.* at 2278-79. Thus, the Court concluded, under the principles articulated in *Lee*, the delivery of the invocation before school football games impermissibly applied social and peer pressure to coerce dissenters to forfeit their right to attend the games "'as the price of resisting conformance to state-sponsored religious practice.'"[7] *Id.* at 2280 (quoting *Lee*, 505 U.S. at 596). The Court further concluded that the pregame delivery of the invocation had the improper effect of coercing those present to participate in an act of religious worship. *See id*; *see also Lee*, 505 U.S. at 594 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

In *Lee*, the Court held that a school district violated the Establishment Clause when it invited a rabbi to deliver a nonsectarian, nonproselytizing prayer at its graduation ceremony. 505 U.S. at 581, 599. The Court reasoned that, because the principal decided that an invocation should be given, chose the rabbi and gave her guidelines for the prayer and the school had extensive control over the graduation ceremony - including control over the contents and timing of the program, the speeches, the dress code and the decorum of the students - the prayer bore the imprint of the state. *Id.* at 587-90, 597. The Court noted that the singular importance of a high school graduation as a once-in-a-lifetime event and the susceptibility of adolescents to peer and social

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7 In both *Santa Fe* and *Lee*, the Court emphasized that the threat of coercion caused by public and peer pressure to attend important school events is heightened in the public high school context because adolescents are more susceptible to such pressure, especially as to issues of social convention. *See Santa Fe*, 120 S. Ct. at 2280; *Lee*, 505 U.S. at 592-93.

pressure left a dissenting student with the unduly coercive dilemma of participating in the prayer against her conscience or missing her own high school graduation. *See id.* at 592-96. Because this dilemma gave dissenting students no legitimate alternative to attending their graduation, the Court concluded the school district had in effect "compelled . . . participation in an explicit religious exercise." *Id.* at 598.

A. Cole's Invocation

[8] Applying these principles to the present case, it is clear the District's refusal to allow Cole to deliver a sectarian invocation as part of the graduation ceremony was necessary to avoid an Establishment Clause violation. The invocation would not have been private speech, because the District authorized an invocation as part of the graduation ceremony held on District property, allowed only a student selected by a vote of his classmates to give an invocation and no doubt would have used a microphone or public address system to amplify the invocation to the audience at the graduation ceremony. *See Santa Fe*, 120 S. Ct. at 2275-78; *see also Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760-62 (9th Cir. 1981) (holding that district policy under which principal and district superintendent gave student council permission to select a student to open school assemblies with prayer constituted impermissible government sponsorship of religious activity under the Establishment Clause). In addition, as the Court noted in *Santa Fe*, an invocation policy by its very terms appears to reflect an impermissible state purpose to encourage a religious message.[8] 120 S. Ct. at 2277

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8 In the wake of *Santa Fe*, it may be that the District's invocation policy itself violates the Establishment Clause. *See* 120 S.Ct. at 2278-79, 2282. We do not reach this issue, however, because it was

(concluding that term "invocation" is "a term that primarily describes an appeal for divine assistance"). Furthermore, Cole's sectarian invocation would have caused a more serious Establishment Clause violation than in Santa Fe because there the invocation was required to be "nonsectarian and nonproselytizing." *Id.* at 2273 n.6; *Lee*, 505 U.S. at 589 (noting that a nonsectarian prayer "is more acceptable than one which, for example, makes explicit reference to the God of Israel, or to Jesus Christ"); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 ("The legislative prayers involved in *Marsh* did not violate this principle [against government affiliation with a particular religious sect] because the particular chaplain had 'removed all references to Christ.'" (quoting *Marsh v. Chambers*, 463 U.S. 783, 793 n.14, (1985))); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 809, 815 (5th Cir. 1999) (holding that a graduation policy that does not limit speakers to "nonsectarian, nonproselytizing speech" violates the Establishment Clause), *aff'd on other grounds*, 120 S.Ct. 2266 (2000).

B. Chris Niemeyer's Proposed Valedictory Speech

[9] Chris Niemeyer's valedictory speech presents a more difficult issue as to whether the speech was private or attributable to the District. As the appellants argue, the valedictorian speech policy neither encourages a religious message nor subjects the speaker to a majority vote that operates to ensure only a popular message is expressed at the graduation. *See Santa Fe*, 120 S.Ct. at 2276-77. Nonetheless, we conclude the District's plenary control over the graduation ceremony, especially student speech, makes it apparent Niemeyer's speech would have borne the imprint

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not raised.

of the District. *See Lee*, 505 U.S. at 590. First, the District authorizes the valedictory speech as part of the District-administered graduation ceremony, which is held on District property and financed in part by District funds and in which only selected students are allowed to speak. *See Santa Fe*, 120 S. Ct. at 2275-76. Second, the principal retains supervisory control over all aspects of the graduation, and has final authority to approve the content of student speeches. *See id.* Third, the District requires the students to sign a special contract obligating them to act and dress in a manner prescribed by the District. *See Lee*, 505 U.S. at 597. Finally, the speech presumably is broadcast to the audience over a school microphone or public address system. *See Santa Fe*, 120 S. Ct. at 2279. Allowing Niemeyer to give his proposed valedictory speech at the Oroville graduation would have constituted government endorsement of religious speech similar to the prayer policies found unconstitutional in *Santa Fe* and *Lee*. Because District approval of the content of student speech was required, allowing Niemeyer to make a sectarian, proselytizing speech as part of the graduation ceremony would have lent District approval to the religious message of the speech. Equally important, an objective observer familiar with the District's policy and its implementation would have likely perceived that the speech carried the District's seal of approval. *See id.* at 2278; *Santa Fe*, 168 F.3d at 817-18 ("When the school 'permits' sectarian and proselytizing prayers - which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint . . . - such 'permission' undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion."). The District's actual and perceived endorsement of Niemeyer's proselytizing would have sent a message to dissenting members of the audience that "'they are outsiders, not full members of the political community,'" *Santa Fe*, 120 S. Ct. at 2279 (quoting

Lynch v. Donnelly, 465 U.S. 668, 688 (1984)), thereby pressuring the dissenters to change their religious views to gain acceptance.

[11] Including Niemeyer's sectarian, proselytizing speech as part of the graduation ceremony also would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice. *See Texas Monthly v. Bullock*, 489 U.S. 1, 23 (1989) (noting that proselytizing is religious activity protected under the Free Exercise Clause); *Follett v. McCormick*, 321 U.S. 573, 576-77 (1944) (noting that proselytizing, including preaching and distribution of religious literature, is religious activity protected under the Free Exercise Clause); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) (same). As the Court acknowledged in *Lee*, our society recognizes that even simply standing or remaining silent can signify adherence to the views of others. Thus, allowing Niemeyer's speech at graduation would have compelled a dissenter's implicit participation in the proselytizing. It is no answer that some, or even most, dissenters might have believed their silence signified respectful disagreement. The critical inquiry under *Santa Fe* and *Lee* to determine if religious activity at a major public school event constitutes impermissible coercion to participate is whether "a reasonable dissenter . . . *could* believe that the group exercise signified her own participation or approval of it." *Lee*, 505 U.S. at 593 (emphasis added). "The choice between whether to attend [a school event] or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution. . . demands that [a] school many not force this difficult choice upon [its] students for 'it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored

religious practice.'" *Santa Fe*, 120 S. Ct. at 2280 (quoting *Lee*, 505 U.S. at 596) (final alteration in original). We, like the Supreme Court, "recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment." 120 S. Ct. at 2278. Cole and Niemeyer remained free to pray and to proselytize outside of school or in contexts where the District would not have been an actual or perceived party to their religious activities. Indeed, the Religion Clauses promote robust private religious debate, allowing each religion to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952). However, "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some [government] involvement and entanglement are inevitable, lines must be drawn." *Lemon v. Kurtzman*, 403 U.S. 602, 625, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971); *see also Lee*, 505 U.S. at 589 ("Preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . . ."). The requirement that religion be left to the private sphere is the product of a well-documented and turbulent history, demonstrating that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Lee*, 505 U.S. at 591-92. This danger is most apparent here, where allowing the students to engage in sectarian prayer and proselytizing as part of the graduation ceremony would amount to government sponsorship of, and coercion to participate in, particular religious

practices.[9]

CONCLUSION

We hold that Cole and Chris and Jason Niemeyer can no longer sustain their equitable claims now that they have all graduated from Oroville High School. We further hold that the other Oroville students, parents of Oroville students and other persons likely to attend future graduations lack standing because the likelihood that they will in fact suffer an injury is too speculative. Finally, we hold that, although Cole and Chris Niemeyer have standing to bring damage claims against District officials, the officials did not violate the students' right to freedom of speech. Rather, District officials acted reasonably to avoid violating the Establishment Clause.

AFFIRMED.

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[9] Avoiding an Establishment Clause violation is also a sufficiently compelling interest to justify any burden the District officials' decisions had upon Cole's and Chris Niemeyer's right to the free exercise of religion. *See, e.g., Lee*, 505 U.S. at 587 ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."); *Wisconsin v. Yoder*, 406 U.S. 205, 220-221, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) ("The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause....").

B1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

COLE et al

v. CASE NUMBER:
CIV S-98-1037 LKK DAD

Oroville Union High School et al

XX - Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF June 10, 1999.

Jack L. Wagner,
Clerk of the Court

ENTERED: June 10, 1999

by: /s/
K.Heiser, Deputy Clerk

C1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE; CHRIS NIEMEYER; and JASON NIEMEYER,

Plaintiffs,

NO. CIV. S-98-1037 LKK/DAD

v.

ORDER

OROVILLE UNION HIGH SCHOOL DISTRICT; BARRY KAYRELL, individually and as Superintendent of the OROVILLE UNION HIGH SCHOOL DISTRICT; LARRY PAYNE, individually and as Principal of OROVILLE UNION HIGH SCHOOL; JEFF PLOTNICK, individually and as Vice-Principal of OROVILLE UNION HIGH SCHOOL,

Defendants.

I.

FACTS[1]

Ferrin Cole and Chris Niemeyer, former students of Oroville

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[1] The facts as summarized here are undisputed unless otherwise noted.

High School (OHS), brought this action against the Oroville Union High School District (District), the District's Superintendent, members of the District's School Board, and the Principal and Vice Principal of OHS.

On June 5, 1998, the District held a graduation ceremony for the class of 1998. Cole and Niemeyer were members of that class. OHS held the ceremony at a football stadium owned by the District and located off school grounds. In keeping with OHS tradition, the senior class selected one of its members to deliver an invocation at the ceremony. That student was Ferrin Cole. Another OHS tradition permits the valedictorian of the senior class to address the audience. Chris Niemeyer was the valedictorian for the class of 1998.

For the past several years, the OHS principal has required each student who plans to speak at graduation to submit a copy of his or her address for approval prior to the ceremony. The District has a written policy which protects a student's right "to express opinions, to take stands, and to support causes, publicly or privately."

After previewing Cole's proposed prayer, defendant Jeff Plotnick, Vice-Principal of OHS, informed Cole that the prayer contained too many references to God and Jesus and that the prayer would have to be more inclusive of faiths that worship other deities. After previewing Niemeyer's proposed valedictorian address, defendant Larry Payne, Principal of OHS, likewise informed Niemeyer that the address contained too many references to God and Jesus.[2]

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[2] Niemeyer proposed to deliver the following as his valedictory address:

Tonight, as we gather to celebrate this moment in our lives, I want to propose and ask you to respond to three questions; they can apply to all in attendance-WHO ARE WE?, WHY ARE WE HERE?, AND WHERE ARE WE GOING?

WHO ARE WE? On this memorable occasion, we are graduates, family, teachers, and friends, most looking toward the future for success. We are a people with busy lives and diverse backgrounds, yet deep inside each of us we are all in search of true happiness and something worth living for. Although we strive for perfection, we constantly fall short. Some of us merely exist, some struggle to make it from one day to the next. Some succeed at most everything we attempt. All of us long for love and acceptance. I believe as a whole, we share one distinct similarity-the one, and only, perfect God created us. Each of us has value. We are all God's children, through Jesus Christ's death, when we accept His free love and saving grace in our lives.

WHY ARE WE HERE? What is our purpose for existence? It has been said that until you have found something worth dying for, you are not really living. We have all been given our lives by God, in order to glorify Him. I believe that God has a plan for each one of our lives-a plan to prosper us and give us a hope for the future. As individuals, we have a choice, of whether to choose His perfect will in our lives or our own futile plans. But whatever our plans and dreams are, I believe they will not fully succeed unless we pattern our lives after Jesus' example.

WHERE ARE WE GOING? We do not know what tomorrow holds. Some of us may leave here tonight and become doctors, lawyers, or teachers. One of us may find a cure for AIDS or cancer or we may discover a technological breakthrough. Most of us desire to be successful, contribute to society, and make a difference. However as we leave tonight and go our separate ways,

Defendant Barry Kayrell, Superintendent of the District, informed each student that, unless he adopted the suggestions of Plotnick and Payne, he would not be allowed to speak at the graduation ceremony. Ultimately, Niemeyer chose to deliver a secular address, while Cole chose not to deliver an invocation.

Cole and Niemeyer allege that defendants violated their rights to free speech, free exercise, due process and equal protection. On December 14, 1998, the court dismissed all of their claims against the District as well as all of their damages claims against the individual defendants. Thus, the only remaining claims are those seeking injunctive relief enjoining the individual defendants:

> (1) from censoring or editing (a) any invocation or prayer to be offered at a graduation ceremony of Oroville High School; (b) any student's speech given at the graduation ceremony of Oroville High School; except for expression which is obscene, libelous or slanderous, or which creates a clear and present danger of the commission of unlawful acts on school premises, or which will result in the substantial disruption of the graduation

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may we remember one thing: God seeks a personal relationship with each one of us, as He longs for us to live forever with Him. Jesus wants to be our best friend. When others let us down-He will not. If we let Him direct our lives, He will give us the desires of our heart. Do you look to the future with uncertainty or confidence, fear or peace? Whether a graduate, family member, teacher or friend, I encourage you to accept God's love and grace. We must yield to God our lives and let Him direct our future paths. For with God, you will find eternal happiness and absolute success in all that you do.

See Plaintiffs' Statement of Undisputed Facts, Exh. D.

ceremony;

(2) from censoring or editing expression because of its religious viewpoint; or

(2) from preventing, disciplining, or forbidding any student from offering an invocation, prayer, or speech because he or she will not submit to such censoring or editing.

Third Amended Complaint at 8:13-28, 9:1.

The case is now before the court on the parties' cross- motions for summary judgment and on Cole and Niemeyer's motion for a preliminary injunction.

II.

STANDARDS

A. SUMMARY JUDGEMENT

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992).

Under summary judgment practice, the moving party

[A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions

> of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); See also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of

affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; See also Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; See also T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); See also International Union of Bricklayers Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); See also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed,

Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); see also Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

B. PRELIMINARY INJUNCTION

The purpose of the preliminary injunction as provided by Fed. R. Civ. P. 65 is to preserve the relative positions of the parties -- the status quo -- until a full trial on the merits can be conducted. See University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). The limited record usually available on such motions renders a final decision on the merits inappropriate. See Brown v. Chote, 411 U.S. 452, 456 (1973).

"The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In the Ninth

Circuit, two interrelated tests exist for determining the propriety of the issuance of a preliminary injunction. The moving party carries the burden of proof on each element of either test. See Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1203 (9th Cir. 1980).

Under the first "traditional" test, the court may not issue a preliminary injunction unless each of the following requirements is satisfied: (1) the moving party has demonstrated a likelihood of success on the merits; (2) the moving party will suffer irreparable injury and has no adequate remedy at law if injunctive relief is not granted; (3) in balancing the equities, the non-moving party will not be harmed more than the moving party is helped by the injunction; and (4) granting the injunction is in the public interest. See Martin v. International Olympic Committee, 740 F.2d 670, 674-75 (9th Cir. 1984).

Under the second "alternative" test, the court may not issue a preliminary injunction unless the moving party demonstrates "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." The Ninth Circuit has explained that the two parts of the alternative test are not separate and unrelated, but are "extremes of a single continuum." Benda v. Grand Lodge of International Association of Machinists, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979.). We are taught that the critical element within this alternative test is the relative hardship to the parties. See Id. Even if the balance tips sharply in favor of the moving party, however, it must be shown at an "irreducible minimum" that there is a "fair chance of success" on the merits. International Olympic Committee, 740 F.2d at 674-75.

Additionally, "[s]peculative injury does not constitute irreparable injury." Goldie's Bookstore v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984). In exercising their sound discretion, courts should pay particular regard to public consequences in granting an injunction. Weinberger, 456 U.S. at 312.

A far more stringent standard is applied where mandatory, as opposed to prohibitory, preliminary relief is sought. The Ninth Circuit has noted that although the same general principles inform the court's analysis, "where a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction." Martin v. International Olympic Committee, 740 F.2d 670, 675 (9th Cir. 1984). Thus, an award of mandatory preliminary relief is not to be granted unless both the facts and the law clearly favor the moving party and extreme or very serious damage will result. Anderson v. United States, 612 F.2d 1112, 1115 (9th Cir. 1979). "[I]n doubtful cases, or where the injury complained of is capable of compensation in damages" a mandatory injunction will not issue. Id.

III.

ANALYSIS

Cole and Niemeyer seek an injunction prohibiting future implementation of defendants' policies and practices governing student speech at graduation ceremonies. Before assessing the merits, the court must determine whether any plaintiff has standing to challenge defendants' policies and practices on graduation speech.

A. STANDING

To demonstrate standing, a plaintiff "must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct, and the injury or threat of injury must be 'both real and immediate', not 'conjectural' or 'hypothetical'." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). The only remaining claims of Cole and Niemeyer, the original plaintiffs, seek prospective injunctive relief. Since both have already graduated, they are no longer subject to defendants' policies and practices concerning graduation speech. Because defendants' actions no longer pose any threat of injury to these plaintiffs' constitutional rights, they lack standing to prosecute this action.

Ferrin Cole and Chris Niemeyer contend that they have standing to sue for injunctive relief under the "capable of repetition yet evading review" exception to the general rule articulated in Lyons. Present doctrine does not support that claim.

"The capable of repetition doctrine applies only in exceptional situations where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Spencer v. Kemna, 118 S. Ct. 978, 988 (1998) (citing Lyons, 461 U.S. at 109 and Lewis v. Continental Bank Corp., 494 U.S. 472, 481 (1990)). Because Ferrin Cole and Chris Niemeyer will never again be subject to defendants, policies and practices on graduation speech, the "capable of repetition" exception does not support their standing.

Pursuant to various orders granting leave to amend, there were added as parties-plaintiff: Jason Niemeyer; Does 1 and 2, freshmen at OHS with high grade point averages who plan to deliver sectarian speeches at their graduation ceremonies; Doe 3, a junior at OHS with a grade point average not as high as Does 1 and 2 but who also plans to deliver a sectarian speech at his/her graduation ceremony; Roes 1, 2 and 3, the guardians of Does 1, 2, and 3; John Niemeyer, another freshman with excellent grades; Janet Niemeyer, the mother of John and Jason, and the original plaintiffs, Chris Niemeyer and Ferrin Cole, in their capacity as taxpayers. I now examine the standing of each new plaintiff.

Jason is the younger brother of Chris Niemeyer and the valedictorian for the class of 1999 at OHS. Jason is in the same position this year as Chris was a year ago. The parties have stipulated that, like his brother before him, Jason plans to deliver a sectarian valedictory speech. It is clear that Jason has standing for the claims made on his behalf.[3] It seems equally clear, however, that none of the other proposed additional plaintiffs has standing to prosecute this action.

No one can predict whether John Niemeyer or Does I, II or III will be class valedictorians or whether OHS will allow them to speak at their graduation ceremonies in some other capacity. Therefore, neither John Niemeyer nor Does I-III can articulate an immediate threat of injury posed by defendants' decision to prohibit

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[3] Whereas the second amended complaint alleged violations of the right to free speech, free exercise, due process and equal protection, the third amended complaint alleges violations of the right to be free from the establishment of religion as well. See Third Amended Complaint (3AC) at ¶32e.

sectarian speech at the graduation ceremony. See Lyons, 461 U.S. at 101-02.[4]

Finally, the third amended complaint alleges that Roes 1, 2 and 3, Janet Niemeyer, Chris Niemeyer and Ferrin Cole have standing as taxpayers to prosecute the claim alleging that defendants' policies and practices violate the Establishment Clause of the United States Constitution. The contention cannot prevail.

A taxpayer can demonstrate direct injury and thus standing only when he brings a "good-faith pocketbook action." Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429, 434 (1952) (taxpayer standing asserted to challenge reading of the Old Testament). To demonstrate standing, the plaintiff must "set forth his or her status as a taxpayer . . ., challenge . . . the appropriating, transferring, and spending . . . of taxpayers' money from the General Fund of the State Treasury . . . and set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes." Hoohuli v. Ariyoshi, 741 F.2d 1169, 1180 (9th Cir. 1984).

The third amended complaint does not allege, nor can it sensibly, that there are monies appropriated for an unlawful purpose in connection with the District's supervision of the OHS graduation ceremony or Jason's valedictory speech. Accordingly, the proposed adult-plaintiffs lack standing to prosecute this action as taxpayers.

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[4] Because Janet Niemeyer and Roes 1, 2 and 3 in their capacity as guardians only have derivative standing, their suits in that capacity are equally wanting.

Given all the above, the court strikes those portions of plaintiffs' third amended complaint which seek to add parties-plaintiff, save and except Jason Niemeyer proceeding with Janet Niemeyer as his Guardian ad Litem. It follows that the court restrict examination of defendants' policies and practices governing graduation speech only insofar as they bear upon student valedictory speeches. I address each of plaintiff's claims in that regard seriatim.

B. FREE SPEECH

Plaintiff's attack, premised on the free speech provisions of the First Amendment, turns on the right of educators to control student speech and thus ultimately turns on the teaching of the seminal case, Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). There, the Court noted that, under Tinker v. Des Moines Independent Community School District,, 393 U.S. 503, 509, 512-13 (1969), schools may not punish students "merely for expressing their personal views on the school premises . . . ." Id. at 266. It observed, however, that the issue of tolerating student speech is distinct from an affirmative requirement "to promote particular student speech." Id. at 270-71. Where student "expressive activities" might fairly be seen as bearing "the imprimatur of the school," they should be viewed "as part of the school curriculum," id. at 271, and thus subject to review and revision "reasonably related to legitimate pedagogical concerns." Id. at 273.[5]

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[5] In detail the court said:

"The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to

Thus, two issues are raised, whether for Hazelwood purposes this high school graduation ceremony should be considered an expressive activity, and, if so, whether it may be viewed as bearing the imprimatur of the school. If the answer to both inquiries is yes, the graduation is part of the school curriculum, and speech at the graduation is subject to regulation by the school authorities.

The Hazelwood Court explained that "[i]t is only when the decision to censor a school-sponsored . . . vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." Id. at 273 (citation omitted). While the outer dimensions of expressive activity for Hazelwood purposes may be uncertain, the instant case seems simple. As the Supreme Court has observed, "[g]raduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts." Lee v. Weisman, 505 U.S. 577, 595 (1992). Whatever else may be true, the graduation ceremony is an expressive activity.

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promote particular student speech . . . . The latter question concerns educators' authority over . . . expressive activities that . . . might reasonably [be] perceive[d] to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 270-71 (1988).

Nor do I find the question of whether this high school graduation may reasonably be viewed as bearing the imprimatur of the school district particularly difficult. The question is not whether the student's speech bears the imprimatur of the school but whether the graduation ceremony could be so perceived. Here, OHS holds its graduation ceremony on land owned by the District, students and their parents/guardians must sign a behavior contract with the District before they may attend the graduation ceremony, welcoming remarks and introductions are given by the District's Board of Trustees and the Superintendent, and the Principal presents the graduating class. Clearly the school is the sponsor and bears responsibility for the graduation ceremony. There can be no doubt the event is the District's.

Plaintiff's reliance on Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), in support of his argument to the contrary is unavailing. Mergens is easily distinguishable from this case. Plaintiff does not simply seek to meet on campus with other students to share his Christian beliefs.[6] Rather, he seeks a platform to declare before a captive audience his religious beliefs at a school-sponsored event.

Having concluded that the OHS graduation ceremony is part of the school's curriculum, I now turn to deciding whether defendants' decision to forbid plaintiff's sectarian valedictory speech is reasonably related to a legitimate pedagogical concern. The Hazelwood Court recognized the right of educators to disassociate the school from student speech that might "substantially interfere"

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[6] In Mergens, the Supreme Court held that religious expression by high school students in a Bible study group that met on campus could not reasonably be perceived to bear the imprimatur of the school.

with the school's work or present a biased point of view. Hazelwood, 484 U.S. at 266 (quoting Tinker, 393 U.S. at 509). In particular, the Court affirmed educators' right to reject speech that might "associate the school with any position other than neutrality on matters of political controversy." Id. at 272.

The District asserts as a justification for its conduct that allowing plaintiff to deliver a sectarian address would substantially interfere with the school's effort to honor the philosophies and faiths of all its students. Under Hazelwood the tendered justification suffices.[7]

Graduation is a forum to celebrate the class of 1999 in all its diversity. Limiting plaintiff's speech to secular subject matter is reasonably related to that legitimate pedagogical concern. Furthermore, given the proclivity of religious speech in a state-sponsored-event to create political controversy, defendants are permitted under Hazelwood to forbid plaintiff's proposed address.[8]

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[7] This District's purported rationale is somewhat undermined by its previous decision to allow an invocation. Whatever the District's past policy with regard to invocations, however, it cannot be gainsaid as a matter of fact, given a pluralistic society, that sectarian speech by its nature excludes those who are of a different faith.

[8] As this court noted at the last oral argument, defendants' conduct does not denigrate religious belief. On the contrary, it recognizes, as the Establishment Clause does, that religion is central to many people and thus has a particular potential for divisiveness. On this basis, the Fifth Circuit recently held that a school policy permitting student-led sectarian prayer at graduation ceremonies violates the Establishment Clause. Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 1999). Plaintiff's proposed speech would convey as

i. Limited Public Forum

Although defendants have previewed valedictory speeches for years, until Chris Niemeyer submitted his proposed address, defendants never offered students anything more than grammatical guidance. Plaintiff contends that, because defendants did not exercise content control prior to 1998, they turned the OHS graduation ceremony into a limited public forum. I do not agree.

"[S]chool facilities may be deemed to be public forums only if school authorities have by 'policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." Hazelwood, 484 U.S. at 267 (quoting Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985).

Plaintiff offers no evidence that previous valedictorians spoke on matters of political or religious controversy or espoused views that would necessarily offend the sensibilities of some of the graduating class. Nothing before the court suggests that defendants had a need to offer substantive guidance before Chris Niemeyer chose to ignore both the governmental character of a public school setting and the diversity of his colleagues' beliefs. Under the circumstances, plaintiff has not demonstrated that, by virtue of defendants' past passivity, they intentionally opened the graduation

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sectarian a message as the prayer in Doe, and thus permitting its delivery would equally implicate the Establishment Clause.

ceremony for indiscriminate student speech.

Plaintiff's second argument is premised on the District's policy of not interfering with students' rights to express opinions, take stands, and support causes. See Plaintiff's Statement of Undisputed Facts, Exh. C. At first blush, plaintiff's citation to the District's policy presents a much more serious issue. As I now explain, however, the District's policy, properly construed, does not demonstrate its surrender of authority over the content of the curriculum.

The policy is adopted pursuant to a requirement of the California Education Code that school districts adopt rules consistent with § 48907 of that code.[9] I begin by noting that it is not clear that the code section, and thus District policies adopted to conform to it, apply to student speech.[10] Even if it does, and even though the section restricts faculty oversight of student expressive activity vel non, it simply cannot be read to provide for student control of school curriculum. Given Hazelwood's definition of curriculum, the Education Code and its byproduct district policy, do not convert the graduation ceremony into a public forum.

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[9] The Code provides "each governing board of a school district . . . shall adopt rules . . . which shall include reasonable provisions for the conducting of [expressive] activities within its respective jurisdiction." Cal. Educ. Code § 48907.

[10] The Code provides that:

"Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communications upon the premises of each school." Cal. Educ. Code § 48907.

Indeed, the California courts have made clear that under the State's Constitution, the code section cannot transmute a school-sponsored event such as a graduation into an open forum permitting sectarian religious observance. See Bennett v. Livermore Unified School District, 193 Cal.App.3d. 1012 (1987) (relying, inter alia, on Cal. Const. art. IX, § 8).[11]

ii. Viewpoint Neutral

Plaintiff also attacks defendants' conduct by relying on the proposition that, even in a nonpublic forum, the state may not discriminate against speech on the basis of viewpoint. Cornelius, 473 U.S. at 806. None of the cases cited by plaintiff, however, addresses student speech in the context of school-sponsored activities or the effect of the obligations of the Establishment Clause in that context. Put simply, as noted above, in that context other values prevail. See Hazelwood, 484 U.S. at 272-3; Lee, 505 U.S. at 596.

iii. Prior Restraint

Plaintiff contends that, because students must submit their graduation speeches for approval, defendants have placed a prior restraint on his speech.[12] In Lee, the Supreme Court recognized

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[11] Plaintiffs do not suggest that the California constitutional provision is inconsistent with the Free Exercise Clause of the First Amendment to the United States Constitution, and while I observe that such a contention would be unlikely to prevail, consideration of that issue is well beyond the confines of this suit.

[12] Outside the realm of school, prior restraints are almost always viewed as violative of the First Amendment. A prior restraint "avoids

that "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movement, the dress, and the decorum of the students." Lee, 505 U.S. at 596. In Hazelwood, the Supreme Court approved a teacher's decision to excise two pages of a school newspaper before publication on the ground that his decision was reasonably related to a legitimate pedagogical concern. 484 U.S. at 273. See also Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530, 1540 (7th Cir. 1996) ("Prior restraint of student speech in a nonpublic forum is constitutional if reasonable"). Because defendants have not converted the graduation ceremony into a public forum, and given that defendants' decision to disallow sectarian speech is reasonable, plaintiff's claim must be found wanting.

iv. Vagueness and Overbreadth

Plaintiff claims that defendants' policies on graduation speech are unconstitutionally vague because they fail to place students on notice as to precisely what speech is prohibited. Plaintiff attacks defendants for providing no written guidelines on permissible graduation speech and for vesting control over the right to speak in OHS administrators. In making his argument, plaintiff relies on cases that articulate basic vagueness doctrine but do not address its application to situations involving student speech at school-sponsored activities.

In Hazelwood, the Supreme Court rejected the proposition that

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constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." Freedman v. Maryland, 380 U.S. 51, 58 (1965).

"school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations." The Court explained that, "[t]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate." Hazelwood, 484 U.S. at 273 n.6. See also Muller by Muller, 98 F.3d at 1543 (distinguishing for vagueness analysis between speech in a school setting and elsewhere).

Plaintiff couples his vagueness argument with a contention that defendants' policies and practices regarding valedictory speech are unconstitutionally overbroad. Plaintiff contends that defendants' policies and practices prohibit too much speech and consequently threaten to deter students from exercising their rights to freedom of expression. I cannot agree.

The contention that defendants' decision was overbroad ignores its very limited scope. From all that appears, defendants only required that plaintiff revise his speech to omit overly sectarian references, which, as noted, served its legitimate purpose of inclusiveness.

C. FREE EXERCISE

Plaintiff contends that, by requiring him to remove any sectarian references from his address, defendants will force him to forego participation in OHS graduation ceremonies as the class of 1999 valedictorian. On this basis, he claims they have burdened his First Amendment right to freely exercise his religion.

The government infringes on the free exercise of religion when it substantially burdens the observation of a religious belief or

practice, without a compelling state interest. Hernandez v. C.I.R., 490 U.S. 680, 699 (1989). "Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, 'burden' their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony." Lee, 505 U.S. at 629 (Souter, J. concurring).

Simply put, the Free Exercise Clause does not require defendants to afford plaintiff a podium so that he can testify to his faith in God before a captive audience. See Abington School Dist. v. Schempp, 374 U.S. 203, 218-19 (1963). Denying plaintiff the right to promote his religious beliefs before the graduating class of 1999, their friends and families will not burden plaintiff's right to freely exercise his religion.

D. DUE PROCESS

Ferrin Cole and Chris Niemeyer alleged that their "good names, reputations, honor and integrity were impugned when they were deprived, without a hearing, and contrary to the District's own policies, of participation in their graduation." See Pltfs' Oppo. at 28:19-22 (citing Goss v. Lopez, 419 U.S. 565 (1975)). The claim must fail.[13]

The Fourteenth Amendment forbids the States from depriving any person of life, liberty or property without due process of law.

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[13] This order assumes that Jason Niemeyer fears that defendants will fail to afford him due process before forbidding him to deliver his proposed address and that, as a consequence, he will suffer the same alleged embarrassment as his brother.

Before the court can require that defendants afford plaintiffs procedural due process, the court must satisfy itself that defendants threaten to deprive plaintiffs of either a liberty or property interest. Board of Curators of University of Mo. v. Horowitz, 435 U.S. 78, 98 (1978). As I now explain assuming, without deciding, that plaintiffs have a liberty or property interest in speaking at his graduation ceremony, this claim cannot prevail.[14]

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Before suspending a student, school officials must give him oral or written notice of the charges against him, identify the basis of the accusations against him and afford him the opportunity to explain his version of the facts. Goss, 419 U.S. at 581, 583. Again I assume, without deciding, that school officials must afford as much process before denying a student the right to speak at his

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[14] A student's right to a public school education is a property interest, and his interest in his good name may create a liberty interest. Goss v. Lopez, 419 U.S. 565, 574 (1975). A district court in this circuit has held that students do not have either property or liberty interests in attending a graduation ceremony. See Swany v. San Ramon Valley Unified School District, 720 F. Supp. 764, 773 (N.D. Cal. 1989). While this court noted Swany for the purpose of demonstrating qualified immunity, I do not find either its conclusion or rationale compelling. Swany does not give sufficient weight to Hazelwood's definition of the school curriculum as including expressive activities bearing the imprimatur of the school. Whether it follows that, by virtue of the curricular nature of the graduation ceremony plaintiff has a protectable interest in speaking there, raises quite a different issue. Above, I concluded that it did not. In any event, as indicated in the text, plaintiff was accorded all the process due under the circumstances.

graduation ceremony. In the matter at bar, defendants afforded Ferrin Cole and Chris Niemeyer such process. Defendants held a number of meetings with Cole and Niemeyer to explain why the school could not allow them to deliver their proposed addresses. Jason Niemeyer has failed to demonstrate that defendants will not afford him the same attention before forbidding him to deliver his sectarian address. In sum, defendants, policies and practices governing graduation speech do not threaten to deprive Jason Niemeyer of due process.[15]

IV.

ORDER

For all the foregoing reasons, the court hereby makes the following ORDERS:

1. All plaintiffs except Jason Niemeyer by and through his guardian, are DISMISSED for want of standing;

2. Plaintiff's motion for a preliminary injunction is DENIED;

3. Plaintiff's motion for summary judgment is DENIED;

4. Defendants' motion for summary judgment is GRANTED as to plaintiff's free speech, free exercise and due process claims;

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[15] The plaintiff's complaint alleges a violation of the Equal Protection Clause but neither his motion for summary judgment nor his brief in support of a preliminary injunction addresses this claim, and the court assumes it has been abandoned.

5. The court finds that plaintiff has abandoned any claim premised on the equal protection clause; and

6. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: June 10, 1999.

/s/
LAWRENCE K. KARLTON
CHIEF JUSTICE EMERITUS
UNITED STATES DISTRICT COURT

D1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE and CHRIS NIEMEYER,

Plaintiffs,

NO. CIV. S-98-1037 LKK/DAD

v.

OROVILLE UNION HIGH SCHOOL DISTRICT; BARRY KAYRELL, individually and as Superintendent of the OROVILLE UNION HIGH SCHOOL DISTRICT; LARRY PAYNE, individually and as Principal of OROVILLE UNION HIGH SCHOOL; JEFF PLOTNICK, individually and as Vice-Principal of OROVILLE UNION HIGH SCHOOL,

ORDER AFTER HEARING

Defendants.

Defendants' motion to dismiss came on regularly for hearing on December 14, 1998, before the Honorable Lawrence K. Karlton, Chief Judge Emeritus. STEVEN R. BURLINGHAM appeared for plaintiffs; LINDA RHOADS PARKS and MICHELLE L. MUELLER appeared for defendants.

Upon consideration of the pleadings and papers on file herein, and after hearing the argument of counsel, the court announced its disposition of the motion and its reasons therefor into the record as

follows:

This matter is before the court on defendants' motion to dismiss. The standards for such a motion are well-known and need not be repeated here. See Johnson v. City of Chico, 725 F. Supp. 1097, 1098 (E.D. Cal. 1989).

Plaintiffs are former students of Oroville High School ("OHS"). Plaintiff Cole was selected by his classmates to deliver an invocation at their June 5, 1998 graduation ceremony. As valedictorian, plaintiff Niemeyer was asked to deliver a valedictory speech. Defendants, the Oroville Union High School District and certain OHS administrators and school board members rejected Cole's invocation and Niemeyer's speech on the basis that the content of each was too sectarian. Plaintiffs bring this suit against defendants under 42 U.S.C. § 1983 alleging violations of their rights to equal protection, due process, free exercise and free speech.

"Under the Eleventh Amendment, agencies of the state are immune from private damages actions or suits for injunctive relief brought in federal court." Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th cir. 1988) (citing Pennhurst State School & Hosp. v. Haldermann, 465 U.S. 89, 100 (1984)). In California, a school district is a state agency for Eleventh Amendment purposes, Belanger v. Madera Unified School Dist., 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993), and thus the District is entitled to judgment.

Plaintiffs concede that the Eleventh Amendment also bars any damages claims against defendants Kayrell, Payne, and Plotnick in their official capacities, but it does not bar plaintiffs their claims for

injunctive relief against these defendants. See Ex parte Young, 209 U.S. 123 (1998). Nor does the Eleventh Amendment prohibit plaintiffs' damages claims against defendants in their individual capacities.

Defendants contend that they are protected against plaintiffs' § 1983 claims by the doctrine of qualified immunity. Public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Defendants contend that plaintiffs had no clearly established right to deliver either a sectarian invocation or a sectarian valedictory speech at their public high school graduation ceremony. To overcome defendants' assertion of qualified immunity, plaintiffs must prove that they had such a clearly established right.

Because plaintiffs have offered no cases supporting their equal protection and free exercise claims, they have failed to demonstrate that they had clearly established rights under those clauses.

Plaintiffs also have failed to demonstrate a clearly established right under the due process clause. Students do not have either a liberty or property interest to attend a public high school graduation ceremony. Swany v. San Ramon Valley Unified School District, 720 F. Supp. 764, 776 (N.D. Cal. 1989). Given plaintiffs' failure to cite precedent holding that students have a liberty or property interest in speaking at a public high school graduation ceremony, the court concludes that plaintiffs did not have a clearly established right under the due process clause to speak at their graduation ceremony.

Finally, plaintiffs have failed to cite any cases which demonstrate that they had a clearly established right under the free speech guarantee of the First Amendment. The OHS graduation ceremony was not a public forum. OHS had no policy on graduation which permitted students independently to choose the subject matter of their speech. Cf. Doe v. Madison School Dist., 147 F.3d 832, 838 (9th Cir. 1998). Since OHS did not open the ceremony for "indiscriminate use by the public or some segment of the public," Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988), plaintiffs cannot rely on First Amendment precedent involving public forums.

Plaintiffs argue that defendants' actions constitute impermissible viewpoint discrimination. The cases they rely on, however, do not involve student speech at a school-sponsored activity. The High Court has explained "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood at 273. In this case, defendants' actions were reasonably related to the legitimate pedagogical concern of conducting a graduation ceremony which did not offend or intrude upon the religious sensibilities of other students. Accordingly, plaintiffs have failed to demonstrate a clearly established right under the free speech guarantee of the First Amendment to deliver their invocation and valedictory address.

For the foregoing reasons, the court hereby ORDERS:

1. Defendants' motion to dismiss plaintiffs' claims against the Oroville Union High School District is GRANTED;

2. Defendants' motion to dismiss plaintiffs' damages claims against defendants Kayrell, Payne, and Plotnick in their official capacities is GRANTED;

3. Defendants' motion to dismiss plaintiffs, claims for injunctive relief against defendants Kayrell, Payne, and Platnick in their official capacities is DENIED;

4. Defendants' motion to dismiss plaintiffs' damages claims against Kayrell, Payne, and Plotnick in their individual capacities is GRANTED;

5. Defendants' request for attorney's fees is DENIED.

IT IS SO ORDERED.

DATED: December 14, 1998.

/s/

LAWRENCE K. KARLTON
CHIEF JUSTICE EMERITUS
UNITED STATES DISTRICT COURT

§ 48907. Student exercise of free expression

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

"Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

(Added by Stats.1983, c. 498, § 91, eff. July 28, 1983.)

Excerpt of Oroville Union High School Dist. Pol. # 5145.2

Students
Freedom of Speech/Expression

The primary liberties in a student's life have to do with the process of inquiry and learning, of acquiring and imparting knowledge, and of exchanging ideas. The process requires that students have the right to express opinions, to take stands, and to support causes, publicly or privately. There should be no interference in the school with these liberties, or with the students' access to or expression of controversial points of view, except as provided below: (Education Code Section 48907)

1. Bulletin Board: School authorities may restrict the use of certain bulletin boards to school announcements. Ample bulletin board space shall be provided for the use of students and student organizations, including a reasonable area for notices relating to out-of-school activities or matters of general interest to students. The following general limitations on posting may be applied:

   a. School authorities shall prohibit material which is determined to be obscene, libelous, or slanderous; or which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

   b. Identification including address or contact location shall be required on any posted notice of the student or student group issuing same.

c. The school shall require that notices or other communications be officially dated before posting and that such material be removed after a prescribed reasonable time to assure full access to the bulletin boards.

2. Distribution of Printed Material and Circulation of Petitions: Students shall be free to distribute handbills, leaflets and other printed material and to collect signatures on petitions concerning either school or out-of-school issues, whether such materials are produced within or outside the school.

The following general limitations on distribution may be applied:

a. The time of such activity shall be limited to periods before school begins, after dismissal and during lunch time, if such limitation is necessary to prevent interference with the school program.

b. The place of such activity shall be reasonably restricted to permit the normal flow of traffic within the school and at exterior doors.

c. The manner of conducting such activity shall be restricted to prevent undue levels of noise, or to prevent the use of coercion in obtaining signatures on petitions. The danger of littering is not sufficient ground for limiting the right of students to distribute printed materials.

d. The school shall require that all printed matter and petitions distributed or circulated on school property bear the name and address or contact location of the sponsoring

organization or individual.

e. The school shall prohibit the distribution of material within the restricted categories of paragraph 1a above.

3. Buttons and Badges: The wearing of buttons, badges, or armbands bearing slogans or sayings shall be permitted as another form of expression, unless the message thereof falls within the restricted categories of paragraph 1a above. No teacher or administrator shall attempt to interfere with this practice on the ground that the message may be unpopular with students or faculty.

In imposing limitations on student expression for any reason under any of the foregoing provisions, the school must ensure that its rules are applied on a non-discriminatory basis and in a manner designed to assure maximum freedom of expression to the students, but which does not endanger health or safety of other students.

Hearings

The school shall particularly avoid any action placing restraints on ideas prior to their expression. Any student or student group deprived of freedom of expression under any of these provisions shall have the right to request a hearing to determine whether such deprivation is justified under these rules. Such a hearing must be held as soon as possible after request before an impartial body, including representatives of the faculty and student body. The hearing shall provide for a full and fair opportunity for both sides to present evidence and argument as to the propriety of the application of the regulation in question. (Cf. 6145.3-Publications)

Legal Reference: Education Code
48907 Exercise of free expression; rules and regulations
51512 Prohibited use of electronic listening or recording device; penalties
51520 Prohibited solicitations on school premises

Policy adopted:
March 7, 1984, Resolution #149-84

Issued Date: 10/83
BASIC

Chris Niemeyer

BEFORE I START TONIGHT, I WANT TO EXTEND MY GRATITUDE TO OROVILLE HIGH SCHOOL AND ITS STAFF FOR THE GREAT LEARNING EXPERIENCE I HAVE HAD THE PAST FOUR YEARS. ALONG WITH THE GREAT INSTRUCTION I HAVE ALSO BEEN INTRODUCED TO IDEAS AND PHILOSOPHIES THAT HAVE NOT CORRESPONDED WITH MY OWN PERSONAL BELIEFS. I NOW HAVE THE OPPORTUNITY TO SPEAK FROM MY HEART AND SHARE WHAT I KNOW IS THE KEY TO SUCCESS. I SHOULD WARN YOU THAT THE G-WORD AND J-WORD MAY APPEAR IN MY SPEECH - GOD AND JESUS. IF YOU ARE HARSHLY OFFENDED BY MY CONVICTIONS, I WOULD LIKE TO GIVE YOU THE OPPORTUNITY TO LEAVE. ANY TAKERS? AGAIN, MY INTENT IS NOT TO FORCE MY IDEAS OR OFFEND ANYONE, BUT RATHER, TO ENCOURAGE EVERYONE ON THIS OCCASION.

TONIGHT, AS WE GATHER TO CELEBRATE THIS MOMENT IN OUR LIVES, I WANT TO PROPOSE AND ASK YOU TO RESPOND TO THREE QUESTIONS; THEY CAN APPLY TO ALL IN ATTENDANCE- **WHO ARE WE?, WHY ARE WE HERE?,** AND **WHERE ARE WE GOING?**.

WHO ARE WE? ON THIS MEMORABLE OCCASION, WE ARE GRADUATES, FAMILY, TEACHERS, AND FRIENDS, MOST LOOKING TOWARD TH FUTURE FOR SUCCESS. DURING HIGH SCHOOL, I HAVE COME TO BELIEVE THAT THERE ARE THREE TYPES OF PEOPLE IN THIS WORLD. SOME SEE A GLASS AS HALF FULL.

OTHERS SEE IT AS HALF EMPTY. AND THEN THERE ARE THOSE WHO JUST DON'T SEE THE GLASS. BUT WE ARE A PEOPLE WITH BUSY LIVES AND DIVERSE BACKGROUNDS, YET DEEP INSIDE EACH OF US WE ARE ALL IN SEARCH OF TRUE HAPPINESS AND SOMETHING WORTH LIVING FOR. ALTHOUGH WE STRIVE FOR PERFECTION, WE CONSTANTLY FALL SHORT. SOME OF US MERELY EXIST, SOME STRUGGLE TO MAKE IT FROM ONE DAY TO THE NEXT. SOME SUCCEED AT MOST EVERYTHING WE ATTEMPT. ALL OF US LONG FOR LOVE AND ACCEPTANCE. I BELIEVE AS A WHOLE, WE SHARE ONE DISTINCT SIMILARITY - THE ONE, AND ONLY, PERFECT GOD CREATED US. EACH OF US HAS VALUE. WE ARE ALL GOD'S CHILDREN, THOROUGH JESUS CHRIST' DEATH, WHEN WE ACCEPT HIS FREE LOVE AND SAVING GRACE IN OUR LIVES.

WHY ARE WE HERE? WHAT IS OUR PURPOSE FOR EXISTENCE? IT HAS BEEN SAID THAT UNTIL YOU HAVE FOUND SOMETHING WORTH DYING FOR, YOU ARE NOT REALLY LIVING. WE HAVE ALL BEEN GIVEN OUR LIVES BY GOD, IN ORDER TO GLORIFY HIM. I BELIEVE THAT GOD HAS A PLAN FOR EACH ONE OF OUR LIVES - A PLAN TO PROSPER US AND GIVE US A HOPE FOR THE FUTURE. AS INDIVIDUALS, WE HAVE A CHOICE, OF WHETHER TO CHOOSE HIS PERFECT WILL IN OUR LIVES OR OUR OWN FUTILE PLANS. BUT WHATEVER OUR PLANS AND DREAMS ARE, I BELIEVE THEY WILL NOT FULLY SUCCEED UNLESS WE PATTERN OUR LIVES AFTER JESUS' EXAMPLE.

WHERE ARE WE GOING? WE DO NOT KNOW WHAT TOMORROW HOLDS. SOME OF US MAY LEAVE HERE TONIGHT AND BECOME DOCTORS, LAWYERS, OR TEACHERS. ONE OF US MAY FIND A CURE FOR AIDS OR CANCER OR WE MAY DISCOVER A TECHNOLOGICAL BREAKTHROUGH. MOST OF US DESIRE TO BE SUCCESSFUL, CONTRIBUTE TO SOCIETY, AND MAKE A DIFFERENCE. HOWEVER, AS WE LEAVE TONIGHT AND GO OUR SEPARATE WAYS, MAY WE REMEMBER ONE THING: GOD SEEKS A PERSONAL RELATIONSHIP WITH EACH ONE OF US, AS HE LONGS FOR US TO LIVE FOREVER WITH HIM. JESUS WANTS TO BE OUR BEST FRIEND. WHEN OTHERS LET US DOWN - HE WILL NOT. IF WE LET HIM DIRECT OUR LIVES, HE WILL GIVE US THE DESIRES OF OUR HEART. DO YOU LOOK TO THE FUTURE WITH UNCERTAINTY OR CONFIDENCE, FEAR OR PEACE? WHETHER A GRADUATE, FAMILY MEMBER, TEACHER, OR FRIEND, I ENCOURAGE YOU TO ACCEPT GOD'S LOVE AND GRACE. WE MUST YIELD TO GOD OUR LIVES AND LET HIM DIRECT OUR FUTURE PATHS. FOR WITH GOD, YOU WILL FIND ETERNAL HAPPINESS AND ABSOLUTE SUCCESS IN ALL THAT YOU DO.

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Attorney for FERRIN COLE
and CHRIS NIEMEYER

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE; CHRIS NIEMEYER; JASON NIEMEYER through his Guardian ad Litem JANET NIEMEYER; JOHN NIEMEYER through his Guardian ad Litem JANET NIEMEYER; JUSTIN HAGAN through his Guardian ad Litem CONNIE HAGAN; VANESSA RALSTON through her Guardian ad Litem TERESA RALSTON, Plaintiffs, vs. BARRY KAYRELL, individually and as Superintendent of the OROVILLE UNION HIGH SCHOOL DISTRICT; LARRY	Case No. CIV. S-98-1037 LKK/DAD SECOND AMENDED VERIFIED COMPLAINT, STATEMENT OF CLAIM, PRAYER FOR RELIEF, DECLARATION AND DEMAND FOR TRIAL

PAYNE, individually and as Principal of OROVILLE HIGH SCHOOL; JEFF PLOTNICK, individually and as Vice-Principal of OROVILLE HIGH SCHOOL; and the following, as Members of the Governing Board of the OROVILLE UNION HIGH SCHOOL DISTRICT: DAVID BRUCE; ROY FISHER; KENNETH HARLAN; SUSAN NEBEN; and LILLAINE SPEESE,

Defendants.

I. JURISDICTION

1. This is a civil action authorized by 42 U.S.C. §1983 to redress the deprivation, under color of State law, of rights secured by the Constitution of the United States. The Court has jurisdiction under 28 U.S.C. §1343. Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §2201 and 2202.

II. PLAINTIFFS

2. At all relevant times herein, Plaintiffs FERRIN COLE and CHRIS NIEMEYER were seniors at OROVILLE HIGH SCHOOL. They were both eighteen years of age and graduated on Friday, June 5, 1998 with their class.

3. Plaintiff JASON NIEMEYER is a senior at OROVILLE HIGH SCHOOL, scheduled to graduate in June of 1999. His grade point average will be the highest in his class, entitling him to the traditional title of "Valedictorian." Plaintiff JASON NIEMEYER shares similar religious beliefs with Plaintiffs CHRIS NIEMEYER and FERRIN COLE. His graduation expression will likely make reference to his religious beliefs and to Jesus Christ.

4. Plaintiff JOHN NIEMEYER is in eighth grade and expects to attend OROVILLE HIGH SCHOOL, commencing in the fall of

1999. He has earned excellent grades in junior high school. He shares similar religious beliefs with Plaintiffs CHRIS NIEMEYER AND FERRIN COLE. His graduation expression would likely make reference to his religious beliefs and to Jesus Christ.

5. Plaintiffs JASON AND JOHN NIEMEYER are under the age of eighteen and bring this action by JANET NIEMEYER, their Guardian ad Litem.

6. Plaintiffs JUSTIN HAGAN and VANESSA RALSTON are fifth graders who expect to attend OROVILLE HIGH SCHOOL after junior high school. Plaintiffs JUSTIN HAGAN and VANESSA RALSTON share similar religious beliefs with Plaintiffs CHRIS NIEMEYER and FERRIN COLE. Their graduation expression would likely make reference to their religious beliefs and to Jesus Christ.

7. Plaintiff JUSTIN HAGAN is under the age of eighteen and brings this action by CONNIE HAGAN, his Guardian ad Litem.

8. Plaintiff VANESSA RALSTON is under the age of eighteen and brings this action by TERESA RALSTON, her Guardian ad Litem.

III. DEFENDANTS

9. OROVILLE UNION HIGH SCHOOL DISTRICT ("DISTRICT") owns and operates OROVILLE HIGH SCHOOL.

10. Defendant BARRY KAYRELL is the Superintendent and an employee of DISTRICT.

11. Defendant LARRY PAYNE is Principal of OROVILLE HIGH SCHOOL and an employee of DISTRICT.

12. JEFF PLOTNICK is Vice-Principal of OROVILLE HIGH SCHOOL and an employee of DISTRICT.

13. Defendants DAVID BRUCE, ROY FISHER, KENNETH HARLAN, SUSAN NEBEN, and LILLAINE SPEESE are MEMBERS of the OROVILLE UNION HIGH SCHOOL

DISTRICT SCHOOL BOARD ("BOARD").

14. All actions of Defendants were deliberate, willful, and with the intent to violate Plaintiffs' First and Fourteenth Constitutional Amendment Rights and rights under the Constitution of the State of California.

15. Defendant BARRY KAYRELL is sued individually and in his official capacity. At all times mentioned in this Complaint, each Defendant acted under the color of California law and as an agent of the other Defendants, acting either officially or individually in furtherance of a plan to do the acts averred in this Complaint. Each of the Defendants either authorized, consented to, or ratified the acts of the other Defendants as herein averred.

16. Defendants DAVID BRUCE, ROY FISHER, KENNETH HARLAN, SUSAN NEBEN, and LILLAINE SPEESE, MEMBERS OF THE BOARD, are sued in their official capacities. At all times mentioned in this Complaint, each Defendant acted under the color of California law and as an agent of the other Defendants, acting either officially or individually in furtherance of a plan to do the acts averred in this Complaint. Each of the Defendants either authorized, consented to, or ratified the acts of the other Defendants as herein averred.

17. Defendant LARRY PAYNE is sued individually and in his official capacity. At all times mentioned in this Complaint, each Defendant acted under the color of California law and as an agent of the other Defendants, acting either officially or individually in furtherance of a plan to do the acts averred in this Complaint. Each of the Defendants either authorized, consented to, or ratified the acts of the other Defendants as herein averred.

18. Defendant JEFF PLOTNICK is sued individually and in his official capacity. At all times mentioned in this Complaint, each Defendant acted under the color of California law and as an agent of the other Defendants, acting either officially or individually in furtherance of a plan to do the acts averred in this Complaint. Each of the Defendants either authorized, consented to, or ratified the acts of the other Defendants as herein averred.

IV. FACTS

19. On June 5, 1998, DISTRICT held a graduation ceremony for the senior class of OROVILLE HIGH SCHOOL. Plaintiffs were students at said high school or are students who are either attending said high school presently or anticipate attending said high school. The graduation has traditionally been held and, on the date in question, was held off school grounds at Harrison Field, a football stadium used by two high schools and also for other public events. OROVILLE HIGH SCHOOL students are not required to attend the graduation ceremony to obtain their degree or graduation.

20. For a number of years, OROVILLE HIGH SCHOOL has had an invocation as part of its graduation ceremony. The student delivering the invocation is chosen, as was Plaintiff FERRIN COLE, by the members of his class. For many years, the Valedictorian of the senior class, chosen because his grade point average is the highest in the class, also addresses the audience. Plaintiff CHRIS NIEMEYER was the Valedictorian of the class which graduated on June 5, 1998.

21. Plaintiff FERRIN COLE was instructed to present his proposed prayer, a copy of which is attached as Exhibit "A", to Defendant JEFF PLOTNICK for review and approval; when he did so, he was told by MR. PLOTNICK that there were too many references to God and Jesus and that he would have to "tone down" the "prayer".

22. Plaintiff COLE inquired what he was allowed to pray and was told by MR. PLOTNICK that the prayer had to be inclusive and could not reference "a god" singular, because some people believe in many gods. It could not refer to "father", because some people worship "mother earth". The prayer could not relate to a "higher being", since some people believe that they themselves are god. MR. COLE thereupon asked the question, "Then to whom am I to pray?" No answer could be given other than to "tone it down".

23. Plaintiff CHRIS NIEMEYER was the OROVILLE HIGH SCHOOL Student Body President and the Valedictorian for the

graduating class at OROVILLE HIGH SCHOOL. As Valedictorian of the graduating class, Plaintiff CHRIS NIEMEYER was invited by Defendant Principal LARRY PAYNE to give a speech at the June 5th graduation, setting forth his perspective on how he was able to achieve his academic success.

24. Plaintiff NIEMEYER prepared the speech attached as Exhibit "B"; when reviewed by Defendant LARRY PAYNE, he was told, as was Plaintiff COLE, that there were too many references to God and Jesus and told to "tone down" the content.

25. Plaintiffs refused to "tone down" the content of their prayer and speech. They spoke with Defendant BARRY KAYRELL, Superintendent of the OROVILLE UNION HIGH SCHOOL DISTRICT, who told them that, if they did not change the content of the prayer or speech, they would not be allowed to speak at all. He further stated that he would not allow any students to speak at the graduation if a Court allowed Plaintiffs to present the prayer or speech.

26. Defendants have no written policy governing the conduct of high school graduations or attempting to regulate student expression at graduation.

27. Defendants, in fact, prevented Plaintiff CHRIS NIEMEYER from delivering the commencement address he prepared or any commencement address.

28. Because of Defendants' policies and restrictions, Plaintiff FERRIN COLE was unable to prepare an invocation he could deliver in good conscience and, thus, did not deliver an invocation at the graduation.

FIRST COUNT
CLAIM FOR RELIEF UNDER TITLE 42 U.S.C. § 1983.

29. The foregoing actions of the Defendants deprived Plaintiffs of the following rights, privileges and immunities secured to him under the U.S. Constitution:

a. The right of Plaintiffs to free speech;

b. The right of Plaintiffs not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States;
c. The right of Plaintiffs to be free from discrimination on the basis of religion;
d. The right of Plaintiffs to freely exercise their religion;

30. The acts, conduct and behavior of Defendants, and each of them, were performed knowingly, intentionally and maliciously.

31. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiffs have been and will continue to be injured by the conduct of the Defendants unless this Court grants the declaratory and injunctive relief Plaintiffs seek. Further, First Amendment violations, constitute irreparable harm. (Elrod v. Burns, 427 U.S. 347, 373 (1976).

PRAYER

WHEREFORE, Plaintiffs pray for Judgment against Defendants, and each of them, as follows:

1. A Declaratory Judgment that the Defendants' acts and policies described herein violate Plaintiffs' rights under the Constitution of the United States of America.

2. A Declaratory Judgment that the Defendants' acts and policies described herein violate Plaintiffs' rights under the Constitution of the State of California.

3. A temporary preliminary and permanent injunction, or temporary restraining order which restrains and enjoins Defendants, their agents, employees, successors, attorneys, and all persons in active concert and participation with it or them:

(1) from censoring or editing (a) any invocation or prayer to be offered at a graduation ceremony of OROVILLE HIGH SCHOOL; (b) any student's speech given at the graduation ceremony of OROVILLE HIGH SCHOOL; EXCEPT FOR expression which is obscene, libelous or slanderous,

or which creates a clear and present danger of the commission of unlawful acts on school premises, or which will result in the substantial disruption of the graduation ceremony;

(2) from censoring or editing expression because of its religious viewpoints; or

(3) from preventing, disciplining, or forbidding any student from offering an invocation, prayer, or speech because he or she will not submit to such censoring or editing.

3. Grant Plaintiffs trial by jury;

4. Grant Plaintiffs attorneys' fees and costs in a sum to be shown at trial;

5. Such other and further relief as this Court may deem just, proper and equitable.

Dated: January 26, 1999

/s/
STEVEN R. BURLINGHAM,
Attorney for Plaintiffs

VERIFICATION

I, STEVEN R. BURLINGHAM, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at 5330 Madison Avenue, Suite F, Sacramento, Sacramento County, California 95841.

I am the attorney of record for Plaintiffs FERRIN COLE, CHRIS NIEMEYER, JASON NIEMEYER, JOHN NIEMEYER, JUSTIN HAGAN, and VANESSA RALSTON in the above-entitled action. The Plaintiffs are absent from the County in which I have my office. For that reason, I am making this Verification on their behalves.

I have read the foregoing SECOND AMENDED VERIFIED COMPLAINT, STATEMENT OF CLAIM, PRAYER FOR RELIEF, DECLARATION AND DEMAND FOR TRIAL, and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 26th day of January, 1999, at Sacramento, California.

/s/
STEVEN R. BURLINGHAM,
Attorney for Plaintiffs

MICHAEL O. HARVEY, SB# 86042
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Attorney for FERRIN COLE
and CHRIS NIEMEYER

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE; CHRIS NIEMEYER; JASON NIEMEYER through his Guardian ad Litem JANET NIEMEYER; JOHN NIEMEYER through his Guardian ad Litem JANET NIEMEYER; DOE I through her Guardian ad Litem ROE I; DOE II through his Guardian ad Litem ROE II; DOE III through his Guardian ad Litem ROE III,	)	Case No. CIV. S-98-1037 LKK/DAD THIRD AMENDED VERIFIED COMPLAINT, STATEMENT OF CLAIM, PRAYER FOR RELIEF, DECLARATION AND DEMAND FOR TRIAL
Plaintiffs,	)	
vs.	)	
BARRY KAYRELL, individually and as Superintendent of the OROVILLE UNION HIGH	)	

SCHOOL DISTRICT; LARRY PAYNE, individually and as Principal of OROVILLE HIGH SCHOOL; JEFF PLOTNICK, individually and as Vice-Principal of OROVILLE HIGH SCHOOL; and the following, as Members of the Governing Board of the OROVILLE UNION HIGH SCHOOL DISTRICT: DAVID BRUCE; ROY FISHER; KENNETH HARLAN; SUSAN NEBEN; and LILLAINE SPEESE,

Defendants.

I. JURISDICTION

1. This is a civil action authorized by 42 U.S.C. §1983 to redress the deprivation, under color of State law, of rights secured by the Constitution of the United States. The Court has jurisdiction under 28 U.S.C. §1343. Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §2201 and 2202.

II. PLAINTIFFS

2. At all relevant times herein, Plaintiffs FERRIN COLE and CHRIS NIEMEYER were seniors at OROVILLE HIGH SCHOOL. They were both eighteen years of age and graduated on Friday, June 5, 1998 with their class.

3. Plaintiff JASON NIEMEYER is a senior at OROVILLE HIGH SCHOOL, scheduled to graduate in June of 1999. His grade point average is the highest in his class, entitling him to the traditional title of "Valedictorian." Plaintiff JASON NIEMEYER shares similar religious beliefs with Plaintiffs CHRIS NIEMEYER AND FERRIN COLE. His graduation expression will likely make reference to his religious beliefs and to Jesus Christ.

4. Plaintiff JOHN NIEMEYER is in eighth grade and is already enrolled at Oroville High School in a single class, geometry, two years ahead of the normal math sequence. He is receiving an outstanding grade in said class. He expects to attend OROVILLE HIGH SCHOOL full time, commencing in the fall of 1999. He has earned excellent grades in junior high school. He shares similar religious beliefs with Plaintiffs JASON AND CHRIS NIEMEYER AND FERRIN COLE. His graduation expression would likely make reference to his religious beliefs and to Jesus Christ.

5. Plaintiffs JASON AND JOHN NIEMEYER are under the age of eighteen and bring this action by JANET NIEMEYER, their Guardian ad Litem.

6. Plaintiffs DOE I and DOE II are freshmen in Oroville High School with very high grade point averages. Each will likely be the valedictorian or salutatorian or will likely otherwise participate in graduation expression at his or her graduation. Each shares similar religious beliefs with Plaintiffs CHRIS NIEMEYER AND FERRIN COLE. Their graduation expression would likely make reference to their religious beliefs and to Jesus Christ.

7. Doe III is a junior at Oroville High School whose grade point average is not as high as DOES I and II, but, who, nonetheless, could be a participant in the graduation exercises at Oroville High School. He shares similar religious beliefs with Plaintiffs CHRIS NIEMEYER AND FERRIN COLE. His graduation expression would likely make reference to his religious beliefs and to Jesus Christ.

8. Plaintiffs DOES I, II and III are under the age of eighteen and bring this action by their parents, ROE I, II, III, their Guardians ad Litem.

9. DOES I-III, ROES I-III, and JOHN NIEMEYER will likely be in attendance at Oroville High School graduations in the years to come.

10. Plaintiffs ROE I-III, JANET NIEMEYER, FERRIN COLE and CHRIS NIEMEYER are taxpayers in Butte County, where the facts alleged herein took place. They challenge

Defendants' actions as alleged herein both because they have a particularized interest in the graduation and because of their standing as taxpayers to assert an Establishment Clause violation.

11. DOES I-III and ROES I-III are using pseudonyms because they fear retaliation by Defendants or the staff at Oroville High School in the grades they receive and other acts.

III. DEFENDANTS

12. OROVILLE UNION HIGH SCHOOL DISTRICT ("DISTRICT") owns and operates OROVILLE HIGH SCHOOL.

13. Defendant BARRY KAYRELL is the Superintendent and an employee of DISTRICT.

14. Defendant LARRY PAYNE is Principal of OROVILLE HIGH SCHOOL and an employee of DISTRICT.

15. JEFF PLOTNICK is Vice-Principal of OROVILLE HIGH SCHOOL and an employee of DISTRICT.

16. Defendants DAVID BRUCE, ROY FISHER, KENNETH HARLAN, SUSAN NEBEN, and LILLAINE SPEESE are MEMBERS of the OROVILLE UNION HIGH SCHOOL DISTRICT SCHOOL BOARD ("BOARD").

17. At all times mentioned in this Complaint, each Defendant acted under color of California law. Each of the Defendants either authorized, consented to, or ratified the acts of the other Defendants as herein averred.

18. Defendant BARRY KAYRELL is sued in his official capacity.

19. Defendant LARRY PAYNE is sued in his official capacity.

20. Defendant JEFF PLOTNICK is sued in his official capacity.

21. Defendants DAVID BRUCE, ROY FISHER, KENNETH

HARLAN, SUSAN NEBEN, and LILLAINE SPEESE, MEMBERS OF THE BOARD, are sued in their official capacities.

IV. FACTS

22. On June 5, 1998, DISTRICT held a graduation ceremony for the senior class of OROVILLE HIGH SCHOOL. Plaintiffs were students at said high school or are students who are attending said high school presently or are parents of students who are attending said high school and are parents who will attend graduations at Oroville High School and are taxpayers in Butte County, California, the County in which Oroville is found. The graduation has traditionally been held and, on the date in question, was held off school grounds at Harrison Field, a football stadium used by two high schools and also for other public events. OROVILLE HIGH SCHOOL students are not required to attend the graduation ceremony to obtain their degree or graduation.

23. For a number of years, OROVILLE HIGH SCHOOL has had an invocation as part of its graduation ceremony. The student delivering the invocation is chosen, as was Plaintiff FERRIN COLE, by the members of his class. For many years, the Valedictorian of the senior class, chosen because his grade point average is the highest in the class, also addresses the audience. Plaintiff CHRIS NIEMEYER was the Valedictorian of the class which graduated on June 5, 1998.

24. Plaintiff FERRIN COLE was instructed to present his proposed prayer, a copy of which is attached as Exhibit "A", to Defendant JEFF PLOTNICK for review and approval; when he did so, he was told by MR. PLOTNICK that there were too many references to God and Jesus and that he would have to "tone down" the "prayer".

25. Plaintiff COLE inquired what he was allowed to pray and was told by MR. PLOTNICK that the prayer had to be inclusive and could not reference "a god" singular, because some people believe in many gods. It could not refer to "father", because some people worship "mother earth". The prayer could not relate to a "higher being", since some people believe that they themselves are god. MR. COLE thereupon asked the question, "Then to whom

am I to pray?" No answer could be given other than to "tone it down".

26. Plaintiff CHRIS NIEMEYER was the OROVILLE HIGH SCHOOL Student Body President and the Valedictorian for the graduating class at OROVILLE HIGH SCHOOL. As Valedictorian of the graduating class, Plaintiff CHRIS NIEMEYER was invited by Defendant Principal LARRY PAYNE to give a speech at the June 5th graduation, setting forth his perspective on how he was able to achieve his academic success.

27. Plaintiff NIEMEYER prepared the speech attached as Exhibit "B"; when reviewed by Defendant LARRY PAYNE, he was told, as was Plaintiff COLE, that there were too many references to God and Jesus and told to "tone down" the content.

28. Plaintiffs refused to "tone down" the content of their prayer and speech. They spoke with Defendant BARRY KAYRELL, Superintendent of the OROVILLE UNION HIGH SCHOOL DISTRICT, who told them that, if they did not change the content of the prayer or speech, they would not be allowed to speak at all. He further stated that he would not allow any students to speak at the graduation if a Court allowed Plaintiffs to present the prayer or speech.

29. Defendants have no written policy governing the conduct of high school graduations or attempting to regulate student expression at graduation.

30. Defendants, in fact, prevented Plaintiff CHRIS NIEMEYER from delivering the commencement address he prepared or any commencement address.

31. Because of Defendants' policies and restrictions, Plaintiff FERRIN COLE was unable to prepare an invocation he could deliver in good conscience and, thus, did not deliver an invocation at the graduation.

FIRST COUNT
CLAIM FOR RELIEF UNDER TITLE 42 U.S.C. § 1983

32. The foregoing actions of the Defendants deprived or threaten to deprive Plaintiffs of the following rights, privileges and immunities secured to him under the U.S. Constitution:

a. The right of Plaintiffs to free speech, including the right to receive information;

b. The right of Plaintiffs not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States;

c. The right of Plaintiffs to be free from discrimination on the basis of religion;

d. The right of Plaintiffs to freely exercise their religion;

e. The right of Plaintiffs to be free from the Establishment of Religion by the government.

33. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiffs have been and will continue to be injured by the conduct of the Defendants unless this Court grants the declaratory and injunctive relief Plaintiffs seek. Further, First Amendment violations, constitute irreparable harm. (Elrod v. Burns, 427 U.S. 347, 373 (1976).

PRAYER

WHEREFORE, Plaintiffs pray for Judgment against Defendants, and each of them, as follows:

1. A Declaratory Judgment that the Defendants' acts and policies described herein violate Plaintiffs' rights under the Constitution of the United States of America.

2. A Declaratory Judgment that the Defendants' acts and policies described herein violate Plaintiffs' rights under the Constitution of the State of California.

3. A temporary preliminary and permanent injunction, or

temporary restraining order which restrains and enjoins Defendants, their agents, employees, successors, attorneys, and all persons in active concert and participation with it or them:

(1) from censoring or editing (a) any invocation or prayer to be offered at a graduation ceremony of OROVILLE HIGH SCHOOL; (b) any student's speech given at the graduation ceremony of OROVILLE HIGH SCHOOL;
EXCEPT FOR expression which is obscene, libelous or slanderous, or which creates a clear and present danger of the commission of unlawful acts on school premises, or which will result in the substantial disruption of the graduation ceremony;
(2) from censoring or editing expression because of its religious viewpoints; or
(3) from preventing, disciplining, or forbidding any student from offering an invocation, prayer, or speech because he or she will not submit to such censoring or editing.

4. Grant Plaintiffs attorneys' fees and costs in a sum to be shown at trial;

5. Such other and further relief as this Court may deem just, proper and equitable.

Dated: April 14, 1999

/s/
STEVEN R. BURLINGHAM
Attorney for Plaintiffs

VERIFICATION

I, STEVEN R. BURLINGHAM, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at 5330 Madison Avenue, Suite F, Sacramento, Sacramento County, California 95841.

I am the attorney of record for Plaintiffs in the above-entitled action. The Plaintiffs are absent from the County in which I have my office. For that reason, I am making this Verification on their behalves.

I have read the foregoing THIRD AMENDED VERIFIED COMPLAINT, STATEMENT OF CLAIM, PRAYER FOR RELIEF, DECLARATION AND DEMAND FOR TRIAL, and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of April, 1999, at Sacramento, California.

STEVEN R. BURLINGHAM
Attorney for Plaintiffs

CHRISTIAN M. KEINER, CBN 95144
MICHELLE MUELLER, CBN 172680
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Attorneys for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE and CHRIS NIEMEYER,	Case No. CIV. S-98-1037 LKK DAD
Plaintiffs,	DEFENDANTS' STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF FEDERAL RULE 56, MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES (FRCP 56)
v.	
OROVILLE UNION HIGH SCHOOL DISTRICT, ET AL.,	
Defendants.	
	Date: April 1-2, 1999
	Time: 10:00 a.m.
	Place: Courtroom 4

Defendants submit this separate Statement of Undisputed

Facts and citation to supporting evidence.

THE PARTIES AND OTHER PARTICIPANTS IN THE DISPUTE

UNDISPUTED FACTS:	SUPPORTING EVIDENCE:
1. Plaintiff Ferrin Cole (hereinafter "Cole") is a resident of Oroville, California, who graduated from Oroville High School on June 5, 1998. Cole currently attends Butte College and plans to attend Moody Bible College in Chicago, Illinois. Cole's vocational goal is to be a youth minister or pastor in a Protestant denomination.	1. Keiner declaration, Exhibit A, Cole deposition, p. 5, line 11, p. 13, lines 10-26, p. 14, lines 1-25.
2. Cole is a member of the Oroville Evangelical Free Church, a Protestant denomination.	2. Keiner declaration, Exhibit A, Cole deposition, p. 15, lines 8-12, p. 16, lines 1.
3. Cole has graduated and any declaratory or injunctive relief granted by the court would not affect him personally.	3. Keiner declaration, Exhibit A, Cole deposition, p. 24, lines 5-18.
4. Plaintiff Chris Niemeyer (hereinafter "Niemeyer") is a	4. Keiner declaration, Exhibit B, Niemeyer deposition, p.5,

former resident of Oroville California, who graduated from Oroville High School as the co-valedictorian on June 5, 1998. Niemeyer was the 1997-98 ASB President. Niemeyer currently resides in San Diego, California, where he attends Point Loma University, a Church of the Nazarene affiliated university. Niemeyer expects to attain a four-year degree with a vocational emphasis in physical therapy.

lines 5-20, p. 16, lines 6-12, p. 17, lines 10-12, p. 20, lines 6-11.

5. Niemeyer has graduated and any declaratory or injunctive relief granted by the court would not effect him personally.

5. Keiner declaration, Exhibit B, Niemeyer deposition, p. 46, lines 9-26; p. 47, lines 1-20.

6. Niemeyer has a brother who is a senior at Oroville High School who theoretically could be the valedictorian, but he is not a party to this lawsuit.

6. Keiner declaration, Exhibit B, Niemeyer deposition, p. 47, lines 21-26; p. 48, lines 1-18.

7. Niemeyer is a member of the Church of the Nazarene, a Protestant denomination, and has not been a member of any

7. Keiner declaration, Exhibit B, Niemeyer deposition, p. 54, lines 11-21.

other church.

8. Niemeyer and Cole in the fall of 1998 founded a group entitled "Students Taking a New Direction" ["STAND"], Exhibit A, Cole deposition, a Christian religious club. The students were granted permission to operate the club pursuant to the Federal Equal Access Act.

8. Keiner declaration, Exhibit B, Niemeyer deposition, p. 19, lines 2-7; Keiner declaration, Exhibit A, Cole deposition, p. 17, lines 12-22; Freidstadt declaration, ¶ 5.

9. The focus of the STAND group was not to be a "huddle group," as far as the Christian students just getting together once a week. The group wanted to be a "light" on the Oroville High School campus and a ministry whenever God gave it the opportunity.

9. Keiner declaration, Exhibit B, Niemeyer deposition, p. 19, lines 8-11; p. 20, line 1; Keiner declaration, Exhibit A, Cole deposition, p. 18, lines 6-18.

10. Ms. Delisa Freistadt ("Freistadt") was the Oroville High School 1998 co-valedictorian based upon her grade-point average. Dr. Hans Freistadt ("Dr. Freistadt") is her father.

10. Freistadt declaration, ¶ 6.

11. Defendant Oroville Union

11. Kayrell declaration, ¶ 4.

High School District (hereinafter "OUHSD") is a political subdivision of the State of California which owns and operates Oroville High School.

12. The District consists of two comprehensive high schools, Las Plumas High School and Oroville High School. In addition, the District operates Prospect High School, a continuation high school, and the Oroville Adult School. The enrollment for both Oroville High and Las Plumas High Schools are approximately 1,000 students each. The graduating class for Oroville High School is approximately 192 students, and for Las Plumas High School, approximately 220 students.

12. Kayrell declaration, ¶ 4.

13. During the 1997-1998 school year and thereafter until December of 1998, named defendants David Bruce, Roy Fisher, Kenneth Harlan, Susan Neben, and Lillaine Speese

13. First Amended Complaint, ¶ 7.

were the duly elected members of the governing board of the OUHSD.

14. The governing board has ultimate authority for adopting policies to govern the district under the immediate direction of the district administration.

14. Kayrell declaration, ¶ 7.

15. Defendant Dr. Barry Kayrell (hereinafter "Kayrell") is the appointed superintendent of schools of OUHSD. Prior to that, Kayrell served as director of curriculum and Las Plumas High School principal. Kayrell is responsible to the governing board for the day-to-day operations of Oroville Union High School District.

15. Kayrell declaration, ¶ 1,2.

16. Defendant Larry Payne (hereinafter "Payne") is the principal of Oroville High School.

16. Payne declaration, ¶ 1.

17. Payne began his appointment as Oroville High School principal in the fall of 1997 and previously served as principal of McCloud High

17. Payne declaration, ¶ 3,4.

School.

18. Payne is responsible to Kayrell and the governing board for the day-to-day operations of Oroville High School.

18. Payne declaration, ¶ 1.

19. Defendant Jeff Plotnick (hereinafter "Plotnick") serves as vice principal for Oroville High School. Plotnick is responsible to Payne.

19. Payne declaration, ¶ 1.

20. Ms. Lani Fridrich (hereinafter "Fridrich") is the principal's secretary for Oroville High School and has served in that position for the past 22 years. In that position, she has responsibility for all the duties of the high school secretary, including several administrative and fiscal tasks involving the high school's graduation ceremony. Fridrich is responsible for receipt of students' graduation speeches, retyping all students' speeches, and delivering the students' speeches to the principal prior to any students' speeches being

20. Fridrich declaration, ¶ 1,2.

placed in the "graduation book," a compilation of all speeches to be given during the graduation ceremony which is placed at the podium the night of graduation.

21. Jason Becker (hereinafter "Becker") is a teacher at Oroville High School. Becker teaches Spanish and French. Becker also served as the class advisor with Ms. Kim Koslin-Scott for the entire four-year period the graduating class of 1998 attended Oroville High School. As the class faculty advisor, Becker had the additional duty relating to graduation ceremonies of assisting in the preparation of the graduation ceremony, including selection of student speakers and assisting student speakers with his/her proposed speech.

21. Becker declaration, ¶ 1; Keiner declaration, Exhibit A, Cole deposition, p. 39, lines 10-20.

22. Ms. Kim Koslin-Scott (hereinafter "Koslin-Scott") is a former certificated teacher at Oroville High School who served as a special day class

22. Koslin-Scott declaration, ¶ 1.

teacher. Koslin-Scott also served as the senior class advisor with Jason Becker and had the same duties with respect to graduation ceremonies as did Becker. Koslin-Scott currently is employed as a resource specialist at Wilcox High School in the Santa Clara Unified School District.

23. Mr. Mark McKinnon (hereinafter "McKinnon") is a former teacher with the OUHSD. McKinnon is currently employed by Butte College. From 1988 to 1998, McKinnon was the senior English instructor at Oroville High School. As a voluntary duty, McKinnon assisted graduation speakers in drafting and revising graduation speeches.

23. McKinnon declaration, ¶ 1,3,4.

OROVILLE HIGH SCHOOL GRADUATION PRACTICES

24. The Principal at each high school has primary responsibility for supervising all aspects of the graduation ceremonies.	24. Payne declaration, ¶5, 6; Kayrell declaration, ¶5.
25. Students and their parents/guardians sign a behavior contract to attend any OUHSD graduation.	25. Kayrell declaration, ¶6.
26. The OUHSD has no written governing board policies regarding graduation ceremonies, the selection of student speakers, or the content of student speeches (religious or otherwise) during graduation ceremonies.	26. Kayrell declaration, ¶5, 8.
27. The Oroville High School graduation is held upon OUHSD-owned property and public funds are expended on the ceremony. It traditionally consists of the following elements: welcoming remarks and introductions of the board of trustees and superintendent	27. Kayrell declaration, ¶5.

by the school principal; singing of the National Anthem and flag salute; followed by a vocal selection which will be sung by a student; three graduation speakers; another vocal selection by staff and students; the principal then presents the class; followed by the presentation of diplomas by the board of trustees; there is a presentation and thanks to the class advisors; concluding with a farewell speech and the recessional of the graduates.

28. Most speeches during Oroville High School graduation have been traditionally delivered by students, including invocations. Prior to approximately 1985, the senior class selected the student speakers for the Oroville High School graduation who spoke without administrative review. Due to concerns about the quality of speeches and crowd decorum,

28. Fridrich declaration, ¶2, 3; McKinnon declaration, ¶4.

then-principal Dr. Dennis Doris in approximately 1985 instituted the current system by which all speech at the Oroville High School graduation ceremony was reviewed by Fridrich, retyped by Fridrich, then reviewed and approved by the vice principal or principal. Amendments were made or the speech was approved without change by the administrator. Some speeches were edited for grammatical errors. The speech was then placed in the "graduation book," a compilation of all approved speeches placed at the podium in a binder.

29. Fridrich declaration, ¶3.

29. After 1992, Dr. Doris informed Fridrich that Oroville High School would have to be more careful regarding the content of student-delivered invocations to meet requirements of the 1992 court decisions.

30. McKinnon declaration, ¶3.

31. McKinnon declaration, ¶8.

30. McKinnon worked with the student speakers on their

speeches and invocation from 1988 to 1998.

32. Kayrell declaration, ¶15.

31. McKinnon assisted at least two students after 1992 in drafting invocations acceptable to the entire audience.

32. The graduates of Oroville High School and the other high schools in OUHSD have a nonschool-sponsored baccalaureate service. A baccalaureate service is a traditional religious observance for the purpose of religious expression regarding the graduation "rite of passage."

33. Keiner declaration, Exhibit B, Niemeyer deposition, p. 32, lines 1-2; Keiner declaration, Exhibit A, Cole deposition, p. 134, lines 17-26, p. 135, lines 1-3.

33. For Oroville High School, and all the high schools of the district, the 1998 baccalaureate service was held on Sunday, May 31, 1998, at the Evangelical Free Church.

34. Keiner declaration, Exhibit B, Niemeyer deposition, p. 31, lines 23-26; p. 32, lines 1-26; p. 33, lines 1-26; p. 34, lines 1-5; Keiner declaration, Exhibit A, Cole deposition, p. 135, lines 4-18.

34. Niemeyer and Cole both attended and spoke giving religious "testimony" during the Oroville High School baccalaureate service held at

Evangelical Free Church on
Sunday, May 31, 1998.

1998 OROVILLE HIGH GRADUATION PLANNING

35. Planning for the Oroville High 1998 graduation began in the fall of 1997. Payne, shortly after beginning service as principal, asked Fridrich what the procedure was for planning graduation ceremonies. Fridrich informed Payne of the elements in the ceremony and the procedural steps to be taken with respect to graduation ceremonies, to include the system of review and approval instituted by then-principal Dennis Doris. This process of administration approval was similar to Payne's previous experience as a principal in charge of graduation ceremonies. Payne decided to make no changes at that time in the process or the elements of the ceremony. Payne delegated much of the routine tasks associated with graduation ceremony to

35. Payne declaration, ¶5, 6; Fridrich declaration, ¶5, 18.

Fridrich, Becker, Koslin-Scott, and Plotnick.

36. Becker declaration, ¶3, 4, 4, 6; Koslin-Scott declaration, ¶3; Friedstadt declaration, ¶2; McKinnon declaration, ¶3, 4.

36. On April 20, 1998, a meeting of the Koslin-Scott senior class was held to select graduation speakers. The meeting was announced in the student bulletin, which was read in first period and posted. In the past, a student "speak-off" or competition had been held to determine who would speak during the graduation ceremony, with the exception of the valedictorian, co-valedictorian, or salutatorian, who were determined by grade-point average. During 1998 students were allowed to nominate and vote upon the student speakers, and all who wanted to speak did have the opportunity to speak.

37. Becker declaration, ¶3, 4, 5, 6; Koslin-Scott declaration, ¶3, 4, 5; Freidstadt declaration, ¶7.

37. Senior class advisors Becker and Koslin-Scott told the students present that the speeches had to be nondenominational and Koslin-Scott described "nondenominational" as inclusive of the religious

beliefs of everyone. Koslin-Scott gave an example of a person not being able to practice Buddhist beliefs in a speech and intended for the speeches to be nonoffensive to the entire audience.

38. Keiner declaration, Exhibit B, Niemeyer deposition, p. 151, lines 18-26; p. 152, line 1; Freidstadt declaration, ¶7.

38. Niemeyer recalls a meeting where Becker stated that the invocation had to be "nondenominational."

39. Keiner declaration, Exhibit B, Niemeyer deposition, p. 167, lines 1-26.

39. Niemeyer never went to a person in authority at the school to ask for clarification what "nondenominational" meant.

40. Koslin-Scott declaration, ¶3.

40. No written guidelines were given student speakers regarding what was permissible or impermissible content of the graduation speeches.

41. Freidstadt declaration, ¶8.

41. Faculty advisors did suggest as topics "the past, the present, and the future."

42. Keiner declaration, Exhibit A, Cole deposition, p. 53, lines 6-13; Keiner declaration, Exhibit B, Niemeyer deposition, p. 140, lines 1-5.

42. Cole and Niemeyer testified they did not attend this April 20, 1998, lunch

43. Koslin-Scott declaration,

meeting because they were attending a STAND meeting.

¶3.

43. Approximately 20 students did attend the meeting of April 20, 1998.

44. Becker declaration, ¶5; Koslin-Scott declaration, ¶3; Freidstadt declaration, ¶4.

44. During this meeting, Cole and another student named David Friese were nominated and selected to deliver the invocation.

45. Keiner declaration, Exhibit A, Cole deposition, p. 51, lines 20-24.

45. Cole presumed that he was chosen by his friends to speak at graduation because he is a religious Christian and he can pray.

46. Becker declaration, ¶7.

46. The next date for reviewing student speeches set by Becker and Koslin-Scott was May 3, 1998; however, when Niemeyer requested an extension from May 3 to May 11, 1998, the faculty advisors agreed to the extension.

47. Freidstadt declaration, ¶5.

47. When Niemeyer and Cole were both chosen to present, Freistadt was concerned that they might try to use the graduation ceremony as an

opportunity to recruit others to their religious views. Freistadt is Jewish and her concerns were based on the fact that Niemeyer and Cole were leaders in the STAND group that she perceived was trying to proselytize students by handing out free hot cocoa on cold mornings and pizza at lunch with religious pamphlets and bibles.

48. Freidstadt declaration, ¶6; Payne declaration, ¶7.

48. Freistadt shared her concerns with her father, Dr. Freistadt, who sent a letter on her behalf to Oroville High School Principal Payne May 4, 1998. Dr. Freistadt's letter to Payne stated the following objection to religious speech during the Oroville High School graduation ceremony:

> I am concerned that the invocation, traditionally offered, at the opening of the ceremony, should be completely nondenominational, acceptable to all faiths, and offensive to none. In particular, the

invocation should not end on a reference to Jesus, or such. I am anxious that this policy, which prevailed under previous administration, should remain in force.

49. Kayrell declaration, ¶10; Payne declaration, ¶7.

49. Both Payne and Kayrell specifically considered Freistadt's letter dated May 4, 1998, in their decision-making process.

50. Koslin-Scott declaration, ¶6, Becker declaration, ¶8, 9; McKinnon declaration, ¶5.

50. The next graduation speaker meeting was held on May 11, 1998, during the noon hour in McKinnon's classroom. One student gave her speech. Cole and Niemeyer testified they were not present, they were attending a STAND group meeting. Senior class advisor Koslin-Scott did not attend the May 11, 1998, meeting.

51. Becker declaration, ¶8, 9; McKinnon declaration, ¶5; Koslin-Scott declaration, ¶7, Freidstadt declaration, ¶11.

51. The next graduation speaker meeting was held the next day, May 12, 1998. Koslin-Scott, Becker, McKinnon, and student

52. Becker declaration, ¶9; McKinnon declaration, ¶6, 7; Freidstadt declaration, ¶12; Keiner declaration, Exhibit A,

speakers attended the meeting held in McKinnon's classroom during the lunch hour. Students, including Delisa Freistadt, presented their speeches.

Cole deposition, p. 57, lines 18-22.

52. Both Cole and Niemeyer informed Becker, Koslin-Scott, and McKinnon that their speeches were not ready.

53. McKinnon declaration, ¶7; Keiner declaration, Exhibit B, Niemeyer deposition, p. 145, lines 12-26, p. 149, lines 5-8, p. 151, lines 18-24.

53. McKinnon asked Koslin-Scott and Becker in front of the group of students whether the invocation was to be nondenominational because he knew it had been a concern in the past. Becker and Koslin-Scott responded "yes," the invocation had to be nondenominational.

54. Becker declaration, ¶5.

54. In a follow-up discussion in the student store held shortly after the lunch meeting on May 12, 1998, Becker again reiterated his verbal guidelines regarding the speech and told Cole the "powers that be will either say yea or nay on what your

prayer is."

PLAINTIFF COLE'S INVOCATION

55. Cole's proposed invocation included references to "Heavenly Father " (twice), "Father God," "Father," and closes by stating "We ask these things in the precious holy name of Jesus Christ, Amen."	55. First Amended Complaint, Exhibit B.
56. Cole was aware of numerous deadlines for turning in his invocation to administrators.	56. Keiner declaration, Exhibit A, Cole deposition, p. 59, lines 8-26.
57. Cole had no reason for not having his invocation ready by the deadlines.	57. Keiner declaration, Exhibit A, Cole deposition, p. 60, lines 1-4, p. 62, lines 1-12.
58. Cole did not consider the various religious beliefs of the members of the audience when drafting his proposed invocation.	58. Keiner declaration, Exhibit A, Cole deposition, p. 47, lines 13-26; p. 48, lines 1-26; p. 49, lines 1-3.
59. Cole was aware that the proposed invocation had to be generic, recognizing that	59. Keiner declaration, Exhibit A, Cole deposition,

people had various beliefs.

p. 70, lines 4-20.

60. Cole was aware that his proposed invocation had to be turned into the Principal before approval, before being told once again by Jason Becker in the discussion in the student store on May 12, 1998.

60. Keiner declaration, Exhibit A, Cole deposition, p. 62, lines 7-21, p. 66, lines 22-24, p. 72, lines 8-17.

61. Cole both "did" and "did not" take Becker's directives of May 12, 1998, into account when drafting the invocation, because he thought that if there was a problem either Payne or Plotnick would tell him and that Becker was not the final authority.

61. Keiner declaration, Exhibit A, Cole deposition, p. 75, lines 14-22.

PLAINTIFF NIEMEYER'S SPEECH(ES)

62. Plaintiff Niemeyer began thinking about his co-valedictory graduation speech in November of 1997 when it became clear by his grade-point average that he would be at least a co-valedictorian. Niemeyer thought about themes for the

62. Keiner declaration, Exhibit B, Niemeyer deposition, p. 80, lines 7-13, p.81, lines 1-26, p. 82, lines 7-20, p. 160, lines 4-10.

speech, incidents during the day, and "prayerfully considered" the contents of his speech. Niemeyer did not draft the speech into written form until late May 1998, and wrote the speech down on paper for the first time on Interstate during a automobile trip to San Diego with his father.

63. Niemeyer did share his speech in draft form with his mother, Janet Niemeyer, and his father, Dave Niemeyer, who made written suggestions on drafts of the speech and gave verbal suggestions to Niemeyer.

63. Keiner declaration, Exhibit B, Niemeyer deposition, p. 83, lines 13-17, p. 105, lines 11-20, p. 107, lines 3-8, p. 107, lines 15-24.

64. Niemeyer was aware that he had to turn in his speech to Principal Larry Payne.

64. Keiner declaration, Exhibit B, Niemeyer deposition, p. 153, lines 13-26; p. 154, lines 1-17.

65. Niemeyer understood that if the Principal found anything that he or she disagreed with in the speech, it went back to the student, rather than the student getting to give it at graduation.

65. Keiner declaration, Exhibit B, Niemeyer deposition, p. 158, lines 5-10.

66. Niemeyer was aware that Jason Becker, Kim Koslin-Scott, and Mark McKinnon had expressed a desire to assist him with his speech.

66. Keiner declaration, Exhibit B, Niemeyer deposition, p. 87, lines 1-12, p. 86, lines 19-26.

67. Niemeyer intentionally did not share his proposed speech with Jason Becker, Kim or Mark McKinnon because of the content of his speech and because he knew that they did not share the same convictions that he does, as far as faith.

67. Keiner declaration, Exhibit B, Niemeyer deposition, p. 87, lines 25-26; p. 88, lines 1-4.

68. Niemeyer also did not believe that he needed their assistance.

68. Keiner declaration, Exhibit B, Niemeyer deposition, p. 87, lines 15-17.

69. Niemeyer did not discuss his proposed speech with the co-valedictorian, Delisa Freistadt, because she did not share the same beliefs and convictions that he does, as far as faith.

69. Keiner declaration, Exhibit B, Niemeyer deposition, p. 88, lines 12-19.

70. Niemeyer has spoken to small groups of business persons, including the Rotary Club.

70. Keiner declaration, Exhibit B, Niemeyer

71. Niemeyer has also "testified" to a variety of religious audiences.

deposition, p. 72, lines 20-26; p. 73, lines 1-13.

71. Keiner declaration, Exhibit B, Niemeyer deposition, p. 73, lines 18-26; p. 74, lines 1-26; p. 7, lines 1-26; p. 76, lines 1-3.

72. The fact that there would be a mixed audience of believers and nonbelievers during graduation did not have a huge impact on when he was drafting his speech because of "my convictions from God to share that the speech that He had given me."

72. Keiner declaration, Exhibit B, Niemeyer deposition, p. 90, lines 15-26; p. 91, lines 1-26; p. 92, lines 1-26; p. 93, lines 1-6.

73. The purpose of Niemeyer's speech was to praise God and the speech "glorifies Him through the words."

73. Keiner declaration, Exhibit B, Niemeyer deposition p. 43, lines 22-26, p. 44, lines 1-4.

74. Niemeyer describes the term "testimony" as "what God has done in our life. The specific-it could be a specific in a situation or it could be general use."

74. Keiner declaration, Exhibit B, Niemeyer deposition, p. 60, lines 15-19.

75. The term "witness" or "witnessing" is similar to the term "testimony" for Niemeyer and can be

interchangeable.

75. Keiner declaration, Exhibit B, Niemeyer deposition, p. 61, lines 1-26; p. 62, lines 1-25.

76. "Witnessing" includes missionary work and evangelical attempts to save souls or to convert people to a belief in Jesus Christ.

76. Keiner declaration, Exhibit B, Niemeyer deposition, p. 62, line 26, p. 63, lines 1-8.

77. Statements included within the Niemeyer draft speech(es) such as "we are here to pattern our lives after Jesus's example" are a form of "testimony" and "witnessing" as described by Niemeyer.

77. Keiner declaration, Exhibit B, Niemeyer deposition, p. 119, lines 19-26, p. 120, lines 1-2.

78. Niemeyer's draft speech(es) contain many Christian concepts which are uniquely Christian and which are not universally held in all religions.

78. Keiner declaration, Exhibit B, Niemeyer deposition, p. 114, lines 9-17.

79. If as a result of Niemeyer's speech(es) someone found Jesus or God, Niemeyer believes that would have been a "good result."

79. Keiner declaration, Exhibit B, Niemeyer deposition, p. 70, lines 7-16.

80. The ultimate answer to the question "what are the keys to success" as posed by

the Niemeyer draft speech(es), is: "absolute success would be that, if we had God as part of our lives, Jesus as our best friend, then He will give us success. And it might not be living in the nicest house, nicest area of town. But He will give us peace because we have Him – and we would feel successful because we have Him in our lives."

80. Keiner declaration, Exhibit B, Niemeyer deposition, p. 127, lines 10-25.

81. Niemeyer agrees that "within the vast array of Christian denominations and sects there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion." Niemeyer understands that some people within Oroville, California, who attended the graduation ceremony would not accept the divinity of Jesus or the existence of God.

81. Keiner declaration, Exhibit B, Niemeyer deposition, p. 68, lines 18-26; p. 69, lines 1-19.

82. Although Niemeyer disagrees with the Sacramento Bee's editorial

statement "the speech was an in-your-face example of sectarian arrogance," Niemeyer does understand how an audience member, if the speech had been given, could have come to the same conclusion.

82. Keiner declaration, Exhibit B, Niemeyer deposition, p. 128, lines 8-24.

83. Although Niemeyer disagrees with these statements, Niemeyer understands how an audience member, if he/she had heard his proposed speech, could come to the conclusions that it was "over the top" and "excessive."

83. Keiner declaration, Exhibit B, Niemeyer deposition, p. 128, lines 25-26, p. 129, lines 1-3, p. 130, lines 11-15.

84. Niemeyer agrees that the speech could be "preaching" if "preaching" is defined as "testifying" or "witnessing," because "That's witnessing, witnessing of what God has done in my life, what He can do for others."

84. Keiner declaration, Exhibit B, Niemeyer deposition, p. 129, lines 18-25.

ADMINISTRATIVE DISAPPROVAL OF SPEECHES

85. Niemeyer turned his speech into Fridrich for Payne to review on May 28,

85. Keiner declaration, Exhibit B, Niemeyer deposition, p. 169, lines 9-

1998. Payne reviewed the speech and had Fridrich direct Niemeyer to his office.

19; Keiner declaration, Exhibit C; Fridrich declaration, ¶11.

86. On either May 28 or May 29, 1998, Payne and Niemeyer met in Payne's office to discuss the speech. The parties exchanged viewpoints and Payne informed Niemeyer that he could not approve the speech. Payne counseled the student regarding the contents of the speech and suggested that Niemeyer review the speech with his parents over the weekend.

86. Payne declaration, ¶9; Keiner declaration, Exhibit B, Niemeyer deposition, p. 173, lines 18-24, p. 174, lines 15-26, p. 176, lines 4-6.

87. By the end of this first meeting with Principal Larry Payne, Niemeyer knew he could not deliver a speech without Principal Payne's approval.

87. Keiner declaration, Exhibit B, Niemeyer deposition, p. 191, lines 4-10.

88. Niemeyer's position at that time was not to change his speech.

88. Niemeyer deposition, p. 174, lines 2-6, p. 175, lines 14-22.

89. Later, in reflecting upon Payne's comments and authority as principal, Niemeyer decided to add a

89. Keiner declaration, Exhibit B, Niemeyer deposition, p. 99, lines 8-26,

preface to the speech which "invited" those offended by the "G- word" or "J word" to leave. The "J word" and "G-word" are references to a Christian pop song.

p. 100, lines 1-5, Vol. II, p. 79, lines 16-21, p. 80, lines 1-4.

90. On Monday, June 1, 1998, Payne telephoned Kayrell and informed him of his problems with Niemeyer's proposed graduation speech. Payne faxed a copy of the speech to Kayrell and requested the review and advice of district legal counsel. Kayrell confirmed that he would transmit the speech to district legal counsel for review. Kayrell and Payne ended that conversation with Kayrell stating he would get back to Payne after review of legal counsel.

90. Payne declaration, ¶12; Kayrell declaration, ¶10.

91. On Monday, June 1, 1998, Niemeyer returned to the principal's office and turned the revised speech in to Fridrich. Fridrich retyped it and handed it in to principal Payne.

91. Fridrich declaration, ¶12; Keiner declaration, Exhibit B, Niemeyer deposition, p. 197, lines 19-22; Keiner declaration, Exhibit D.

92. Payne and Niemeyer had a meeting and Payne informed Niemeyer that the speech was unacceptable because he had not changed the references which were religious in nature. The speech, as Payne saw it, would have attempted to violate the standards of the United States Constitution, the separation of church and state; it was religious in nature through its theme; it was not directed in the spirit of the graduation, instead it was an attempt to convert people to Niemeyer's way of thinking as far as church is concerned.

92. Payne declaration, ¶10, 11.

93. As of Monday, June 1, 1998, Niemeyer once again knew he could not deliver his speech without Principal Larry Payne's approval.

93. Keiner declaration, Exhibit B, Niemeyer deposition, p. 191, lines 11-14.

94. On Monday evening, June 1, 1998, during an Academic Awards banquet for Oroville High School, Fridrich once again told Cole that she needed him to turn in his invocation.

94. Fridrich declaration, ¶8.

95. Kayrell declaration, ¶11;

95. On June 2, 1998, Tuesday morning, Payne received a telephone call from Kayrell in which Kayrell stated that both he and district legal counsel concurred with Payne's non-approval of Niemeyer's speech due to its religious content.

Payne declaration, ¶14; Keiner declaration dated June 5, 1998, ¶4.

96. Kayrell's reasons included that the speech seemed more of a religious testimonial that could be objectionable to people of non-Christian beliefs. Kayrell felt it really had a proselytizing message.

96. Kayrell declaration, ¶11.

97. Both Kayrell and Payne ended the conversation by reiterating that the speech as drafted could not be approved, but Payne and perhaps Kayrell could work with Niemeyer to change the speech.

97. Kayrell declaration, ¶12; Payne declaration, ¶14.

98. During the morning of June 2, 1998, Cole completed his invocation in one draft, because it was a prayer and he was used to

98. Keiner declaration, Exhibit A, Cole deposition, p. 40, lines 6-13, p. 42, lines 16-18.

drafting prayers. Cole's invocation originally had two students listed as speakers, "Ferrin" and "David." However, Cole himself drafted the entire invocation.

99. Keiner declaration, Exhibit A, Cole deposition, p. 41, lines 16-26, p. 42, lines 1-3.

99. David Friese voluntarily dropped out of any delivery of the graduation invocation. Cole intended after that decision to deliver the entire invocation.

100. Keiner declaration, Exhibit A, Cole deposition, p. 82, lines 13-26, p. 83, lines 1-23.

100. Cole initially turned his draft invocation into Vice Principal Plotnick, and the two held a meeting to discuss the invocation.

101. Keiner declaration, Exhibit A, Cole deposition, p. 83, lines 12-26; p. 84, lines 1-4.

101. During the meeting with Plotnick, Plotnick told Cole to make the reference to God "nondenominational."

102. Keiner declaration, Exhibit A, Cole deposition, p. 88, lines 17-25, p. 89, lines 18-26, p. 90, lines 1-9.

102. Payne in a later meeting with Cole stated that the speech had to be nondenominational and could not make any reference to any one particular God.

103. Keiner declaration, Exhibit A, Cole deposition, p. 89, lines 18-26; p. 90, lines 1-12.

103. Cole was made aware by Payne of the letter(s) from

community member(s) and was told to take out references to God and Jesus because it could seriously offend people.

104. Keiner declaration, Exhibit B, Niemeyer deposition, Vol II., p. 24, lines 20-25, p. 25, lines 1-25, p. 26, lines 1-8.

104. On Wednesday, June 3, 1998, in the morning, the two plaintiffs and their attorney, Michael Harvey, held a press conference attended by print and broadcast media.

105. McKinnon declaration, ¶9; Keiner declaration, Exhibit B, Niemeyer deposition, Vol. II, p. 8, lines 23-25, p. 9, lines 1-25.

105. On Wednesday, June 3,1998, also had a discussion with McKinnon in which Niemeyer indicated no further compromise was possible.

106. Keiner declaration, Exhibit A, Cole deposition, p. 43, lines 17-26, p. 94, lines 1-25; Keiner declaration, Exhibit B, Niemeyer deposition, Vol. II, p. 13, lines 1-17, p. 14, lines 3-25, p. 15, lines 1-12, p. 19, lines 6-9; Kayrell declaration, ¶14.

106. On Wednesday afternoon, June 3, 1998, Niemeyer went to Kayrell's office for an unscheduled meeting with Kayrell regarding their proposed graduation speeches. The parties exchanged views. At the conclusion of that meeting, both speeches were still not approved. Cole and Niemeyer decided to continue to assert their

107. Keiner declaration, Exhibit B, Niemeyer deposition, Vol. II, p. 26, lines 16-20, p. 28, lines 1-10;

perceived right to deliver their proposed graduation speeches.

Keiner declaration, Exhibit A, Cole deposition, p. 103, lines 3-10.

107. On June 4, 1998, Cole and Niemeyer traveled with their attorneys for an ex parte meeting with the federal district court regarding their request for a temporary restraining order.

108. Freidstadt declaration, ¶16.

108. Freistadt was relieved that the court did not force her to listen to Cole's invocation or Niemeyer's speech. Freistadt wanted her graduation to be a time to celebrate a passage in their lives and to shed a few tears with friends; rather than turn into a religious circus.

109. Freidstadt declaration, ¶17.

109. Later, Freistadt read the speech that Niemeyer had wanted to present at graduation. The part that offended her the most was when Niemeyer directed people to leave the ceremony if they were offended by references to God and Jesus.

Although Niemeyer's religious references are

contrary to Freistadt's convictions, Freistadt would not want to be placed in a position in which she had to choose between leaving her own graduation or listening to a distasteful and demeaning oration. Freistadt hopes she would have had the courage to stand up and leave her own graduation, even though she had earned her position as co-valedictorian.

110. Freistadt believes she should have been able to graduate as co-valedictorian of her class without being subjected to offensive religious proselytizing.

110. Freidstadt declaration, ¶18.

DATED: March 1, 1999.

GIRARD & VINSON

By: /s/
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THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE, CHRIS NIEMEYER,	)	Case No. CIV. S-98-1037
Plaintiffs,	)	LKK DAD
vs.	)	PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS
OROVILLE UNION HIGH SCHOOL DISTRICT, et al.,	)	
Defendants.	)	
	)	Date: April 1, 1999

) Time: 9:15 a.m.
_____) Courtroom: 4

Plaintiffs submit this PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS. Plaintiffs admit all of Plaintiffs Undisputed Facts except those specifically denied here.

Defendants' Facts	Plaintiffs' Denial & Citation
1. The OUHSD has no written governing board policies regarding graduation ceremonies, the selection of student speakers, or the content of student speeches (religious or otherwise) during graduation ceremonies.	1. WRITTEN POLICIES DID EXIST GOVERNING STUDENT EXPRESSION Defendants' Fact # 26 asserts that "the OUHSD [Oroville Union High School District] has no written governing board policies regarding graduation ceremonies, the selection of student speakers, or the content of student speeches (religious or otherwise) during graduation ceremonies. **Plaintiffs deny this fact:** in fact, Defendants had explicit policies in force which required the District to allow students to support causes in public, forbad the Defendants from applying rules in a

discriminatory manner and forbad prior restraint. Said policies applied to all student expression, including graduation expression. Exhibit 29 in the Deposition of Barry Kayrell. Kayrell Dep. Vol. II, 16.12- 19.15; Kayrell Dep. Vol. II 17.6-.13.

28. Most speeches during Oroville High School graduation have been traditionally delivered by students, including invocations. Prior to approximately 1985, the senior class selected the student speakers for the Oroville High School graduation who spoke without administrative review. Due to concerns about the quality of speeches and crowd decorum, then-principal Dr. Dennis Doris in approximately 1985 instituted the current system by which all speech at the Oroville High School graduation ceremony was reviewed by Fridrich, retyped by Fridrich, then reviewed and approved by the vice principal

28. DEFENDANTS DID NOT RETAIN THE RIGHT TO APPROVE THE VIEWPOINT OF STUDENT GRADUATION SPEAKERS.

Defendants assert at their undisputed fact #28 that all speech at the OHS was approved by the principal or vice principal. Plaintiffs do not deny that Defendants retained the right to approve student graduation expression within constitutional bounds, that is for grammar and other age-inappropriate content; however, Plaintiffs' dispute that Defendants retained the right to approve of the viewpoint by which they addressed their subject matter. This is evident

or principal. Amendments were made or the speech was approved without change by the administrator. Some speeches were edited for grammatical errors. The speech was then placed in the "graduation book," a compilation of all approved speeches placed at the podium in a binder.

both from the District's written policies and its practice of editing only for grammar. Plaintiffs' Statement of Undisputed Fact 15, 20.

37. Senior class advisors Becker and Koslin-Scott told the students present that the speeches had to be nondenominational and Koslin-Scott described "nondenominational" as inclusive of the religious beliefs of everyone. Koslin-Scott gave an example of a person not being able to practice Buddhist beliefs in a speech and intended for the speeches to be nonoffensive to the entire audience.

37. DEFENDANTS GAVE CONFLICTING AND INAPPROPRIATE DEFINITIONS OF "NONDENOMINATIONAL."

Plaintiffs admit that Plaintiff COLE was instructed to give a "nondenominational" prayer at graduation; however, Plaintiffs would note that Defendants gave Plaintiff COLE conflicting definitions of nondenominational to Plaintiffs. Kim Koslin- Scott interpreted "nondenominational" as inclusive of all religious beliefs. DSUF 37. Jason Becker told COLE that

"nondenominational" permitted reference to "Father", "Lord", or "our Father." Deposition of Jason Becker 11.15-12.4. Mark McKinnon, who assisted graduation speakers, testified that he did not hear "nondenominational" defined at all (Deposition of McKinnon 25.12ff) and that the term was only applied to the invocation. Ibid 24.21ff. At that, Kim Koslin and Jason Becker misunderstand the usual meaning of the term and gave it inappropriate meaning. See Declarations of Jim Sawyer, ThD, and Jon Venema, PhD.

59. Cole was aware that the proposed invocation had to be generic, recognizing that people had various beliefs.

59. COLE WAS AWARE THAT DEFENDANTS SOUGHT A GENERIC PRAYER

Defendants' undisputed Fact # 58 has ambiguous wording. It reads, "Cole was aware that the proposed invocation had to be generic, recognizing that people had various beliefs." A fair reading of his deposition at page 70.4ff shows that Cole

was aware that Becker sought a generic invocation, that Becker sought an invocation recognizing that people had various beliefs, not that the invocation "had to be" generic or "had to" recognize that people had various beliefs.

63. Niemeyer did share his speech in draft form with his mother, Janet Niemeyer, and his father, Dave Niemeyer, who made written suggestions on drafts of the speech and gave verbal suggestions to Niemeyer.

63. NIEMEYER'S PARENTS DID NOT INSTRUCT HIM AS TO THE SUBSTANCE OF HIS GRADUATION ADDRESS.

Defendants' Undisputed Fact # 63, that NIEMEYER'S parents made written suggestions on the drafts of the speech, is true but is incomplete. In explanation, NIEMEYER also testified that the structure of the speech and the speech itself was his, not their, creation and that they merely assisted him in clarifying his wording and thoughts. Deposition of Niemeyer 107.9-109.1.

65. Niemeyer understood that if the Principal found anything

65. NIEMEYER DID NOT BELIEVE THAT LARRY

that he or she disagreed with in the speech, it went back to the student, rather than the student getting to give it at graduation.

PAYNE, PRINCIPAL OF OHS, WOULD REJECT HIS SPEECH DUE TO ITS VIEWPOINT.

Defendants Undisputed Fact # 65 asserts that "Niemeyer understood that if the Principal found anything that he or she disagreed with in the speech, it went back to the student, rather than the student getting to give it at graduation." **Plaintiffs deny this fact** as it badly misstates Plaintiff's testimony. NIEMEYER testified that he did not realize that "until the principal said yes, the speech was not delivered at graduation" (Deposition of Niemeyer 158.15ff) and that he did not expect the principal to reject his expression on the basis of its viewpoint. Ibid, 158.23-159.10.

80. The ultimate answer to the question "what are the keys to success" as posed by the Niemeyer draft speech(es), is: "absolute success would be

80. DEFENDANTS ADD LANGUAGE TO NIEMEYER'S DRAFT SPEECH.

that, if we had God as part of our lives, Jesus as our best friend, then He will give us success. And it might not be living in the nicest house, nicest area of town. But He will give us peace because we have Him – and we would feel successful because we have Him in our lives."

Defendants' Undisputed Fact # 80 inserts words in NIEMEYER'S graduation speech which were not present there. **Plaintiffs deny this fact as it simply misquotes the speech;** the speech, attached to PSUF as Exhibits E and F, should speak for itself. It simply reads, "AS WE LEAVE TONIGHT, MAY WE REMEMBER ONE THING: GOD SEEKS A PERSONAL RELATIONSHIP WITH EACH ONE OF US, AS HE LONGS FOR US TO LIVE FOREVER WITH HIM. JESUS WANTS TO BE OUR BEST FRIEND. WHEN OTHERS LET US DOWN, HE WILL NOT ...."

Dated: March 18, 1999

RESPECTFULLY SUBMITTED,

GARY, TILL & BURLINGHAM

/s/

STEVEN R. BURLINGHAM

L1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FERRIN COLE; CHRIS NIEMEYER; JASON NIEMEYER through his Guardian ad Litem JANET NIEMEYER,	Case No. CIV. S-98-1037 LKK DAD
Plaintiffs,	DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS
v.	
OROVILLE UNION HIGH SCHOOL DISTRICT, ET AL.,	
Defendants.	Date: April 1-2, 1999 Time: 9:15 a.m. Place: Courtroom 4

Defendants submit this separate Response to Plaintiffs' Statement of Undisputed Facts as required by the Eastern District of California Local Rule 56-260(b).

PLAINTIFFS' ALLEGED UNDISPUTED FACTS	DEFENDANTS' RESPONSE TO PLAINTIFFS' ALLEGED UNDISPUTED FACTS
1. In June of 1998, Plaintiffs Ferrin Cole and Chris Niemeyer, both 18 years of age, were seniors at Oroville High School. Answer to Plaintiffs' Complaint, paragraph ("¶") 4 (Admission by Failure to Deny Allegation in Plaintiffs' Verified Complaint).	1. Defendants agree this is undisputed.
2. They were scheduled to graduate and, in fact, graduated from Oroville High School, on Friday, June 5, 1998 with their class. Answer to Plantiffs' Complaint, ¶ 4.	2. Defendants agree this is undisputed.
3. The graduation was held off school grounds, at Harrison Field, a football stadium, owned by Defendant OROVILLE UNION HIGH	3. Defendants agree this is undisputed.

SCHOOL DISTRICT and used by two high schools and also for other public events. Deposition ("Dep.") of Larry Payne, page 131, lines 3 through 12 ("131.3-.12").

4. Oroville High School seniors are not required to attend the graduation ceremony to obtain their degree or graduate. Answer to Plaintiffs' Complaint ¶8 (Admission by Failure to Deny Allegation in Plaintiffs' Verified Complaint.)

4. Defendants agree this is undisputed.

5. OROVILLE UNION HIGH SCHOOL ("DISTRICT") owns and operates Oroville High School. Answer to Planitiffs' Complaint ¶ 5.

5. Defendants agree this is undisputed.

6. Defendants DAVID BRUCE, ROY FISHER, KENNETH HARLAN, SUSAN NEBEN, and LILLAINE SPEESE are MEMBERS of the OROVILLE UNION HIGH SCHOOL DISTRICT

6. Defendants agree this is undisputed as of the date of the graduation ceremony of June 5, 1998.

SCHOOL BOARD ("BOARD"). Answer to Plaintiff's First Amended Verified Complaint ¶ 1.

7. Defendants DAVID BRUCE, ROY FISHER, KENNETH HARLAN, SUSAN NEBEN, and LILLAINE SPEESE, as MEMBERS of the OROVILLE UNION HIGH SCHOOL DISTRICT SCHOOL BOARD ("BOARD"), set and establish the policies of the OROVILLE UNION HIGH SCHOOL DISTRICT. Kayrell Dep. 44.19ff.

7. Defendants agree this is undisputed.

8. Defendant BARRY KAYRELL is the Superintendent of the OROVILLE UNION HIGH SCHOOL DISTRICT and an employee of Defendant DISTRICT. Answer to Plaintiffs' Complaint, ¶ 12.

8. Defendants agree this is undisputed.

9. Defendant LARRY PAYNE is the Principal of Oroville High School, and Defendant

9. Defendants agree this is undisputed.

JEFF PLOTNICK is the Vice-Principal of Oroville School; both are employees of Defendant DISTRICT. Answer to Plaintiffs First Amended Complaint ¶1.

10. It has been the tradition at Oroville High School that the senior or seniors with the highest grade point average, known as the Valedictorian, deliver a commencement address. Becker Dep. 7.25-8.8; Koslin-Scott Dep. 16.23-17.2; Fredrich Dep. 29. 13 -17.2; Fridrich Dep. 29.13-.17.

10. Defendants agree this is undisputed.

11. It has been the tradition at Oroville High School that an invocation to be given by a senior student. Becker Dep. 7.25-8.8.

11. Defendants agree this is undisputed.

12. In 1998, those present at an open meeting of the senior class (Koslin-Scott Dep. 11.5-12.14; 14.6-.14) called for the planning of graduation chose to have an invocation in the graduation ceremony. Becker

12. Defendants agree this is undisputed. However, the Oroville High School Principal Larry Payne previously decided to continue the elements in the graduation ceremony, including the

Dep. 8.8-8.11; 7.25.	invocation. (Defendants' Statement of Undisputed Facts #35.)
13. Copies of past graduation programs reflecting the content of past graduations at Oroville High School are attached to this Statement of Undisputed Facts as Exhibit "A".	13. Defendants agree this is undisputed.
14. For approximately 8 years, all commencement expression, including the invocation and valedictory address, have been submitted to the Oroville High School principal, typed and placed in a "Graduation Book." Fridrich Dep. 10.17 A copy of the Graduation Book is attached to this Statement of Undisputed Facts as Exhibit "B".	14. Defendants agree this is undisputed. However, the approval practice commenced in 1985, aproximately 13 years ago. (Defendants' Statement of Undisputed Facts #28.)
15. True and correct copies of three of the pages of the policies of the OROVILLE UNION HIGH SCHOOL DISTRICT SCHOOL BOARD in force in June of 1998 regarding student expression are attached hereto	15. Defendants agree this is undisputed.

as Exhibit "C". These were marked as Exhibit 29 in the Deposition of Barry Kayrell Dep. Vol. II, 16.12-19.15.

A. The policy at the page numbered 29E reads, "The process [of inquiry and learning] requires that students have the right to express opinions, to take stands, and to support causes, publicly and privately. There should be no interference in the school with these liberties or with the student's access to or expression of controversial points of view, except as provided below."

A. Defendants agree this is undisputed.

B The same policy (Exhibit "C") at the page numbered 29F provides that, "In Imposing limitations on student expression for any reason under any of the foregoing provisions, the school must ensure that its rules are applied on a nondiscriminatory basis and in a manner designed to assure maximum freedom of expression to the students but

B. Defendants agree this is undisputed.

whichdoes not endanger health or safety of other students."

C. The same policy at the page numbered 29G provides, "The school shall particularly avoid any action placing restraints on ideas prior to their expression. Any student or student group deprived of freedom of expression under any of these provisions shall have the right to request a hearing to determine whether such deprivation is justified under these rules."

C. Defendants agree this is undisputed.

16. Said policies apply to all student expression. Including graduation expression. Kayrell Dep. Vol. II, 17.6-:13.

16. Defendants assert that the applicability of Education Code section 48907 and policy 5131 to a graduation ceremony is an issue of state law for the court. Plaintiffs mischaracterize Defendant Kayrell's testimony. All Defendant Kayrell stated is as follows:

"Q. Is there anything in here which was not in effect on June 5th 1998?

A. No, it was all in effect.

Q. Okay. How time flies. Look at what is the fifth page of Exhibit 29, [policy 5131] the top paragraph, paragraph, third sentence, says there should be no interference in the school with these liberties or with the students' access to or expression of controversial points of view except as provided below. There does not appear to be an exception for graduation; is that correct?

A. Based on the existing text that is correct. However, it would be interesting to review the currentness of that ed code section, which is now almost 20 years old.

Q. Okay. Also, at – let me number these pages. I'm going to number them A— 29 A, 29 B.

(Discussion off the record)

Q. (By MR. BURLINGHAM) Okay. We were referring a

minute ago to page 29 E. And looking at page 29 G it says the school shall particularly avoid any action placing restraints on ideas prior to their expression.

It is true, is it not, that restraining Mr. Niemeyer and Mr. Cole's, quote, the – how to put – let me go back. It's true, is it not, that the prohibition placed upon Mr. Cole and Mr. Niemeyer by Mr. Payne constituted a restraint on ideas prior to their expression?

MR. KEINER: Objection. Calls for a legal conclusion. Do not answer the question."

(Barry Kayrell Deposition, Vol. II, P. 17, lines 3-26, p. 18, lines 7-26.)

17. Defendants have no written directives governing student expression at high school graduations. Fridrich Dep. 8. 16-9.10

17. Defendants agree this is undisputed.

18. Traditionally, there has been no instruction given to

18. Defendants assert the term "instruction" is unclear and

those students speaking at graduation as to the content of their expression. Becker Dep. 23.23-24.5; Fridrich Dep. 25.3-.10; McKinnon Dep. 14.12-16.9.

therefore dispute the phrase "no instruction." Suggestions, assistance, and directives have been routine. (Defendants Statement of Undisputed Facts #21-23, 28-31, 37, 41, 50-54, 56, 59-61, 64-67.

19. No guidance was given to students as to the topic they may choose to speak on at graduation. Becker Dep. 23.23-24.5; Fridrich Dep. 25.3-.10; 29.26-30.5; McKinnon Dep. 14. 12-16.9; Niemeyer Dep. 80.9-83.19.

19. Defendants agree this is undisputed regarding "guidance." However, faculty advisors did suggest as topics "the past, the present, and the future." (Defendants' Statement of Undisputed Facts #41.)

20. Until the 1998 graduation, the only editing of commencement expression by the Oroville High School principal was gramatical. Fridrich Dep. 23. 7-11; 64.9-17; McKinnon Dep. 20.16-21.11.

20. Defendants agree it is undisputed. The only necessary editing until 1998 was grammatical.

NIEMEYER

21. Plaintiff CHRIS NIEMEYER and DeLisa Freistadt were the

21. Defendants agree this is undisputed.

valedictorians for the class graduation from Oroville High School in 1998. Koslin-Scott Dep. 14.15-23; Fridrich Dep. 29.21ff.

22. As Valedictorian of the graduation class, Plaintiff CHRIS NEIMEYER drafted a speech for the June 5 graduation setting forth his perspective on how he was able to achieve his academic success. Niemeyer Dep. 98.12-99.7; 132.1-6.

22. Defendants agree this is undisputed.

23. A true and correct copy of the commencement address which Plaintiff CHRIS NIEMEYER proposed to present is attached to his deposition as Exhibit "G" and to this Statement of Undisputed Facts as Exhibit "D". Niemeyer Dep. 94.8-.9.

23. Defendants agree this is undisputed.

24. On or about May 28,1998, Plaintiff NIEMEYER gave Lani Fridrich, who is Defendant PAYNE's secretary, a copy of his commencement address

24. Defendants agree this is undisputed.

to type and add to the Graduation book. Niemeyer Dep. 169.9-22..

25. On May 29, 1998, after Plaintiff NIEMEYER's proposed commencement address had been reviewed by Defendant LARRY PAYNE, Defendant PAYNE told Plaintiff NIEMEYER that there were too many references to Giod and Jesus and that there were "religious overtones" to the address. Niemeyer Dep. 169.25-170.13.

25. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #86.)

26. Defendant PAYNE told NIEMEYER to "tone down" the content. Niemeyer Dep. 175.25-176.1.

26. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #86.)

27. Defendant PAYNE objected to the commencement address of NIEMEYER because it was "too religious in nature... [and] directed towards attempting to convert to Christianity other people that would have or could have heard that." Payne Dep. 72.11ff

27. Defendants agree this is undisputed as one ground of Defendant Payne's objection. (See also Defendants' Statement of Undisputed Facts #47-49, 86, 90, 92, 95.)

28. On or about June 2, 1998, Plaintiff NIEMEYER added a preface to his address but this was still not acceptable to Defendants. A true and correct copy of the address with the preface to his deposition as Exhibit "H" and to this Statement of Undisputed Facts as Exhibit "E". Niemeyer Dep. 195.5ff-196.10; 201.10-.13.	28. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #87-93, 95-97.)
29. On or about June 3, 1998, Plaintiff's spoke with Defendant BARRY KAYRELL, Superintendent of the Oroville Union High School (Niemeyer Dep., vol II, 8.23ff); he told Plaintiff NIEMEYER to leave out his religious preferences. Niemeyer Dep. 14.12ff.	29. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #106.)
30. Defendant KAYRELL objected to the commencement address of NIEMEYER because it reflected a Christian viewpoint. Kayrell Dep. 78.10ff	30. Defendants agree this is undisputed as one ground of Defendant Kayrell objections. (See also Defendants' Statement of Undisputed Facts #47-49, 90, 95, 96.)
31. Defendant KAYRELL	31. Defendants agree this is

told both Plaintiffs that, if they did not change their expression, they would not be allowed to speak at the graduation ceremony. Kayrell Dep. 74.20ff.

undisputed.

32. To speak of the "Keys to Success" without acknowledging God as he did in his proposed commencement address offended and offends the conscience of Plaintiff NIEMEYER. Niemeyer Dep. Vol II, 19.6-9; 87.20ff.

32. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #62, 66-69, 72-84.)

33. On June 5, 1998, Plaintiff NIEMEYER was not allowed to deliver his commencement address. Payne Dep. 134.20-135.14.

33. Defendants agree this is undisputed.

34. Copies of the graduation expression which was permitted by Defendants at the graduation are attached to this Statement of Undisputed Facts as Exhibit "B", which is the Graduation Book.

34. Defendants agree this is undisputed.

COLE

35. Plaintiff FERRIN COLE was chosen to deliver the invocation at an April 20, 1998 meeting of the senior class open to any interested seniors. Koslin-Scott Dep. 16.10-.17; Niemeyer Dep. 139.21.	35. Defendants agree this is undisputed.
36. Plaintiff FERRIN COLE was not present at the meeting at which he was chosen to pray. Cole Dep. 51.12ff; Niemeyer Dep. 140.19-141.12.	36. Defendants agree this is undisputed.
37. Jason Becker and Kim Koslin-Scott were the senior class advisors to the graduation class of 1998 at Oroville High School. Cole Dep. 39.10-.20.	37. Defendants agree this is undisputed.
38. Jason Becker and Kim Koslin-Scott instructed Plaintiff FERRIN COLE to give a "nondenominational" invocation (Niemeyer Dep. 145.12-17; McKinnon Dep. 24.15-.25; Becker Dep. 23.23-26; 24.6-.10.	38. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #37, 53-54.)
39. A true and correct copy of the invocation which Plaintiff	39. Defendants agree this is undisputed.

FERRIN COLE wrote and proposed to present at graduation is attached to his deposition as Exhibit "G" and to this Statement of Undisputed Facts as Exhibit "F". Cole Dep. 42.19-44.5

40. After submitting his invocation, on or about June 2, 1998, Plaintiff FERRIN COLE was told by Defendants PLOTNICK and PAYNE that there were too many references to God and Jesus and that he would have to "tone down" the "prayer". Cole Dep. 83.18-.23; 89.13-90.9.

40. Defendants agree this is undisputed.

41. Defendant LARRY PAYNE told Plaintiff COLE that his invocation was unacceptable because it was of a religious, sectarian nature. Payne Dep. 95.26-96.7

41. Defendants agree this is undisputed.

42. MR. COLE inquired what he was allowed to pray and was told by MR. PLOTNICK that the prayer had to be inclusive and could not reference "a god" singular,

42. Defendants do not dispute Defendant Plotnick's stated words to the effect the prayer had to be inclusive of all beliefs, but disputes the remainder of #42. (See Defendants'

because some people believe in many gods. It could not refer to "father", because some people worship "mother earth". The prayer could not relate to a "higher being", since some people believe that they themselves are god. Cole Dep. 84.9-2.0

Statement of Undisputed Facts #100-103.)

43. MR. COLE asked the question, "Then to whom am I to pray?" to both Defendant PLOTNICK and PAYNE and no answer was given him other than to "tone it down". Cole Dep. 84.25-85.9; 89.25-90.3.

43. Defendants do not dispute "tone it down," but do dispute that this was the only statement made to Plaintiff Cole. (Defendants' Statement of Undisputed Facts #100-103.)

44. To pray to a god other than the Christian God offends the conscience of Plaintiff COLE. Cole Dep. 89.26-90.3.

44. Defendants agree this is undisputed. (See also Defendants' Statement of Undisputed Facts #55-61.)

45. Defendant KAYRELL told Plaintiff COLE to take the references to God, Jesus and Father out of his proposed invocation. Cole Dep. 93.17, .18; 94.19-96.2.; 95.26ff; Kayrell Dep. 73.17ff.

45. Defendants agree this is undisputed.

46. Defendant KAYRELL told Plaintiff COLE that he could easily be replaced because he had not earned his position as had Plaintiff NIEMEYER and that the graduation ceremony was for his benefit, not the graduates. Cole Dep. 95.3-.7; 97.6ff.

46. Disputed. While this represents Plaintiff Cole's recollection of the meeting, it was not shared by Defendant Kayrell, or even Plaintiff Niemeyer. (See Defendants' Statement of Undisputed Facts #106.)

47. Defendant KAYRELL told both Plaintiffs that, if they did not change their expression, they would not be allowed to speak at the graduation ceremony. Kayrell Dep. 74.20ff.

47. Defendants agree this is undisputed.

48. Plaintiff COLE refused to further change the content of his invocation as a violation of his religion. Cole Dep. 102.15-.20; 95.2ff; 115.24ff.

48. Defendants agree it is undisputed Plaintiff Cole decided not to change his invocation.

49. Plaintiffs were not accorded a hearing within the meeting of Defendant DISTRICT's policy which forbids prior restraint and deprivation of freedom of expression as set forth at page 29G of DISTRICT's policies.

49. Defendants agree it is undisputed that Plaintiffs never requested, and were not accorded, a "hearing" within the meaning of the policy. However, multiple conferences were held. (See Defendants' Statement of Undisputed Facts

Kayrell Dep. Vol. II, 21.18-22.1.	#36, 54, 56-61, 64-69, 85-106.)
50. On June 4, 1998, Las Plumas High School, the other high school under District management, held its graduation ceremony at the same location. Kayrell Dep. 7.8-.12; Payne Dep. 131.10-.15	50. Defendants agree this is undisputed.
51. At the Las Plumas High School graduation, there was explicitly Christian expression by students without incident. Cole Dep. 103.24-105.20.	51. Defendants agree this is undisputed.
52. On June 5, 1998, Plaintiff COLE was not permitted to give their invocation or commencement address. Cole Dep. 116.18ff; 121.8-.18.	52. Defendants agree this is undisputed.

Respectfully submitted,

GIRARD & VINSON

DATED: March 18, 1999.

By _____
Christian M.Keiner
Attorneys for Defendants

Supreme Court, U.S.
FILED
FEB 2 2001
CLERK

(2)

No. 00-1074

IN THE

Supreme Court of the United States

CHRIS NIEMEYER and JASON NIEMEYER,

Petitioners,

v.

OROVILLE UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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39 pp

QUESTION PRESENTED

1. Whether public school educators are entitled to immunity from money damages when disapproving sectarian and proselytizing high school graduation speech pursuant to the "compelling state interest" in compliance with the First Amendment, Establishment Clause.

THE PARTIES

The School District respectfully asserts the only proper petitioners are Chris Niemeyer and Jason Niemeyer for purposes of 42 U.S.C. § 1983 alleged damage claims. Petitioners claim as proper parties Chris Niemeyer and Jason Niemeyer, who were Plaintiffs and Appellants in the District Court and Ninth Circuit Court of Appeals. Petitioners also claim as proper parties other Appellants in the Court of Appeals, who were dismissed by both the Court of Appeals and the District Court as lacking standing to bring their claims.

Respondents are the Oroville Union High School District ("School District"); Barry Kayrell, individually and as Superintendent of the Oroville Union High School District; Larry Payne, individually and as Principal of Oroville Union High School; Jeff Plotnick, individually and as Vice-Principal of Oroville Union High School ("School Officials"); David Bruce, Roy Fisher, Kenneth Harlan, Susan Neben, Lillaine Speese, as members of the governing board of Oroville Union High School District. These Respondents were both Defendants and Appellees below. (Because all Defendants/Appellees were held to be immune from damage claims, Respondents see no reason to now single out any one individual defendant in the case caption.)

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Respondents Oroville Union High School District; Barry Kayrell, individually and as Superintendent of the Oroville Union High School District; Larry Payne, individually and as Principal of Oroville Union High School; Jeff Plotnick, individually and as Vice-Principal of Oroville Union High School; David Bruce, Roy Fisher, Kenneth Harlan, Susan Neben, Lillaine Speese, as members of the governing board of Oroville Union High School District (collectively "Respondents") respectfully request that the petition for writ of certiorari be denied. Petitioners would have this Court set aside well-established precedent involving mootness, standing, immunities, and the First Amendment's Free Speech and Establishment Clauses as applied in the nation's public schools.

RELEVANT CONSTITUTIONAL PROVISIONS

The relevant constitutional provisions are the Free Speech and Establishment Clauses of the United States Constitution, First Amendment, which state in pertinent part: "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . ." Also relevant are the California Constitution, Article I, Section 4; Article XVI, Section 5; and Article IX, Section 8, which state in pertinent part as follows:

Article I, Section 4:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.

Article XVI, Section 5:

> Neither the Legislature, nor any . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . .

Article IX, Section 8:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

STATEMENT OF THE CASE

A. Introduction.

This matter involves Petitioners' attempt to revive money damage claims against Respondents' school board members, and School Officials who met their obligations to maintain decorous and lawful public high school graduation ceremonies. Acting with advice of legal counsel, the School Officials disapproved sectarian and proselytizing graduation speech in ceremonies over which the School District retained plenary control. Co-valedictorian and Petitioner Chris Niemeyer admittedly proposed to testify, witness, or preach from the public podium to a 1998 California public high school graduation audience. The method used in his proposed graduation expression was repetitious "we messages"

directed to the entire audience, e.g., "[w]e are all God's children, through Jesus Christ's death, when we accept His free love and saving grace in our lives. . . ," or "[a]s individuals, we have a choice of whether to choose His perfect will in our lives or our own futile plans"; and he concluded with a call to action addressed to the entire audience that "I encourage you to accept God's love and grace. We must yield to God our lives and let Him direct our future paths. For with God, you will find eternal happiness and absolute success in all that you do." *Supplemental Excerpt of Record* (hereinafter "*SER*") at 188-189; App. G at G1-G3.[1] This religious testimonial would have occurred despite the objections of at least the 1998 Oroville High School co-valedictorian and her family.

B. Procedural History.

The Petitioners' description of the timing and procedural results of the court decisions below is accurate. *Petition* at 5-8. However, the Petition omits certain key substantive grounds for the rulings of the trial and appellate courts germane to Petitioners' "questions presented." First, the trial court in dismissing all damage claims on the basis of qualified immunity set the "contours of the right" pursuant to the First Amendment and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988) ("*Hazelwood*"), App. D at D2-D3. The trial court next held that "[i]n this case, defendants' actions were reasonably

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1. All such references are to the School District's Statement of Undisputed Facts ("Undisputed Facts") as set forth in the Supplemental Excerpts of Record ("SER") before the appellate court, unless otherwise noted. The Petitioners' Appendix herein is referred to as "App."

related to the legitimate pedagogical concern of conducting a graduation ceremony which did not offend or intrude upon the religious sensibilities of other students." App. D at D4. The trial court ruled that Petitioners had failed to demonstrate a "clearly established" right pursuant to the First Amendment. App. D at D4. When subsequently ruling upon the equitable claims, the trial court held that the School District's tendered justification sufficed under *Hazelwood*, 484 U.S. 260, App. C at C17. The trial court in that conclusion also noted that "plaintiffs' proposed speech would convey as sectarian a message as the prayer in *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. Tex. 1999), and thus permitting its delivery would equally implicate the Establishment Clause." App. C at C17-C18.[2]

Second, due to the procedural lack of standing and mootness of claimed equitable relief, the appellate court primarily framed its substantive analysis upon the claimed money damages and immunity issues. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101-1104 (9th Cir. 2000) ("*Cole*"), App. A at A14-A23. The Ninth Circuit panel carefully applied this Court's public school precedent in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (school district invitation to clergy to deliver graduation invocation violates Establishment Clause) ("*Lee*"), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000) (school district policy allowing students to deliver

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2. With respect to Jason Niemeyer, both parties stipulated it was sufficient for the trial court to rule on the basis that: "I have a pleading, which apparently everybody agrees Jason proposes a sectarian speech, something along the lines of his brother's proposed speech." *SER* at 236-238; *RT* of May 27, 1999, p. 23, lines 2-12, App. C at C12.

nonsectarian and nonproselytizing invocation or statement to solemnize football games violates Establishment Clause) ("*Santa Fe Indep. Sch. Dist.*"). *Cole*, 228 F.3d at 1101-1104, App. A at A14-A23. The appellate court concluded that the "District officials acted reasonably to avoid violating the Establishment Clause," to affirm immunity. *Cole*, 228 F.3d at 1105, App. A at A23. The Petitioners did not bring any claimed error to the Ninth Circuit's attention by way of petition for rehearing or rehearing en banc.

C. Brief Statement of Facts.

The Petitioners' factual description omits key facts. *Petition* at 3-5. The Petitioners' Statement of the Case unfortunately ignores the real life religious conflict confronting the School Officials and misstates the undisputed facts before the trial and appellate courts. *Petition* at 3-5. The trial court relied upon undisputed facts and very briefly summarized facts taken from the statements of undisputed facts filed by the parties. *SER* at 240-242, App. C at C1-C5. The appellate court in its de novo review did the same. *Cole*, 228 F.3d at 1096-1097, App. A at A4-A7. The trial court held as a factual matter the School District retained and exercised the right to approve all speech proposed to be delivered at Oroville High School. *SER* at 240-242, App. C at C1-C5. The appellate court determined the School District retained plenary authority over the graduation ceremony to include student speech. *Cole*, 228 F.3d at 1103, App. A at A19. The School District will very briefly set forth certain other key undisputed facts regarding School District graduation ceremonies.[3]

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3. The School District's entire statement of undisputed facts is set forth as Appendix J to the Petition.

The Principal at each high school within the School District has primary responsibility for supervising all aspects of the graduation ceremonies. *SER* at 23, Undisputed Facts #24, App. J at J10. Students and their parents or guardians sign a behavior contract to attend any OUHSD graduation. *SER* at 5, Undisputed Facts #25, App. J at J10. The Oroville High School graduation is held upon School District-owned property and public funds are expended on the ceremony. *SER* at 5, Undisputed Facts #27, App. J at J10. Most speeches during Oroville High School graduations have been traditionally delivered by students. Prior to approximately 1985, the senior class selected the student speakers for the Oroville High School graduation who spoke without administrative review. Due to concerns about the quality of speeches and crowd decorum, the then-principal in approximately 1985 instituted the current system by which all speech at the Oroville High School graduation ceremony is reviewed by the high school secretary; retyped; then reviewed and approved by the vice principal or principal. The Senior Class Advisors and Senior English Instructor first assist the speakers in drafting their remarks. *SER* at 6, 26-28, Undisputed Facts #7-8, 36-46, 51-54, App. J at J3-J4, J15-J17, J19-J21. In 1998, senior class advisors and teachers Jason Becker and Kim Koslin-Scott told student speakers that the speeches had to be nondenominational and Koslin-Scott described "nondenominational" as inclusive of the religious beliefs of everyone. Koslin-Scott gave an example of a person not being able to practice Buddhist beliefs in a speech and intended for the speeches to be nonoffensive to the entire audience. *SER* at 26, Undisputed Facts #37. Speech is placed in the "graduation book," a compilation of all approved speeches placed at the podium in a binder. *SER* at 5, Undisputed Facts #28, App. J at J11-J12.

When Chris Niemeyer (and Ferrin Cole)[4] were chosen to present, the 1998 Co-Valedictorian Delisa Freistadt was concerned that they might try to use the graduation ceremony as an opportunity to recruit others to their religious views. Freistadt is Jewish and her concerns were based on the fact that Niemeyer (and Cole) were leaders in a student religious club that she perceived was trying to proselytize students by handing out free hot cocoa on cold mornings and pizza at lunch with religious pamphlets and bibles. *SER* at 27, Undisputed Facts #47, App. J at J17-J18. Freistadt shared her concerns with her father, Dr. Hans Freistadt, who sent a letter objecting to reference to Jesus during graduation on her behalf to Payne dated May 4, 1998. *SER* at 27, Undisputed Facts #48, App. J at J18. Both Payne and Superintendent Barry Kayrell specifically considered Freistadt's letter in their decision-making process. *SER* at 27, Undisputed Facts #49, App. J at J19.

Chris Niemeyer's proposed speech is set forth as Appendix G to the Petition. Although Chris Niemeyer was aware that School District Senior Class Faculty Advisors Jason Becker, Kim Koslin-Scott, and Senior English teacher Mark McKinnon had expressed a desire to assist him with his speech, *SER* at 29, Undisputed Facts #66, App. J at J24, Chris Niemeyer intentionally did not share his proposed speech with them or Delisa Freistadt because of the content of his speech and because he knew that they did not share the same convictions that he does, as far as faith. *SER* at 29, Undisputed Facts #67, #69, App. J at J24. The fact that there would be a mixed audience of believers and nonbelievers

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4. Petitioners do not raise any claim regarding Ferrin Cole's proposed invocation and Mr. Cole is not a party to this Petition. *Petition* at 5, n.4. The School District no longer permits any invocations. *SER* at 191.

during graduation did not have a huge impact on Chris Niemeyer while he was drafting his speech because of his "convictions from God to share the speech He had given me." *SER* at 30, App. J at J25. The purpose of Chris Niemeyer's speech was to praise God and the speech "glorifies Him through the words." *SER* at 30, Undisputed Facts #73, App. J at J25. Chris Niemeyer agreed that statements such as "we are here to pattern our lives after Jesus's example" are a form of "testimony" and "witnessing" as described by Chris Niemeyer. *SER* at 30, Undisputed Facts #77, App. J at J26. Chris Niemeyer's draft speech(es) contain many Christian concepts which are uniquely Christian and which are not universally held in all religions. *SER* at 30, Undisputed Facts #78, App. J at J26. If as a result of Chris Niemeyer's speech(es) someone found Jesus or God, Chris Niemeyer believes that would have been a "good result." *SER* at 39, Undisputed Facts #79, App. J at J26. Chris Niemeyer agrees that the speech could be "preaching" if "preaching" is defined as "testifying" or "witnessing," because "[t]hat's witnessing, witnessing of what God has done in my life, what He can do for others." *SER* at 31, Undisputed Facts #84, App. J at J28.

The proposed religious expression was not approved by the School Officials, after a series of meetings with Chris Niemeyer, and advice of legal counsel. *SER* at 31-34, Undisputed Facts #85-106, App. J at J28-J35. Chris Niemeyer's speech, as Principal Larry Payne saw it, would have attempted to violate the standards of the United States Constitution, the separation of church and state; it was religious in nature throughout its theme, it was not directed in the spirit of the graduation, instead it was an attempt to convert people to Niemeyer's way of thinking as far as church was concerned. *SER* at 46, App. J at J31. Freistadt ultimately

was relieved that the trial court did not force her to listen to Chris Niemeyer's speech. Freistadt believes she should have been able to graduate as co-valedictorian of her class without being subjected to offensive religious proselytizing. *SER* at 34, Undisputed Facts #110, App. J at J36.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among the Circuits Regarding Graduation Ceremonies.

Petitioners attempt to create a conflict between the Ninth Circuit decision in *Cole* and the decision of the Eleventh Circuit in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) ("*Chandler II*"). *Petition* at 10-14. However, the federal circuits have rejected student sectarian prayer and/or proselytizing speech in the specific context of public high school graduation ceremonies.[5] Similar restrictions in public

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5. *See Stein v. Plainwell Community Sch.*, 822 F.2d 1406 (6th Cir. 1987) (Sixth Circuit pre-*Lee* upheld nonsectarian or nondenominational public high school graduation invocations, but concluded the specific language therein was expressly Christian and unconstitutional); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) ("*Jones II*") (board policy may allow seniors to choose student volunteers to deliver only nonsectarian, nondenominational prayer); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *affirmed on other grounds*, 530 U.S. 290, 120 S. Ct. 2266 (2000) (reiterates no sectarian or proselytizing speech during graduation ceremonies); *ACLU v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (senior class determining whether to include prayer not permissible) ("*Black Horse Pike*"); *Guidry* v. *Broussard*, 897 F.2d 181 (5th Cir. 1990) (summary judgment in favor of a school board upheld in a 42 U.S.C. section 1983 when principal had allegedly censored the religious valedictorian address by the student).

schools apply outside the graduation ceremony.[6] As recently noted by the Sixth Circuit in *Coles*, 171 F.3d at 377: "The Supreme Court's Establishment Clause jurisprudence has been remarkably consistent in sustaining virtually every challenge to government-sponsored religious expression or involvement in the public schools." The Ninth Circuit's *Cole* decision is in accord with this solid line of circuit case law.

Nor is there a conflict between the Ninth Circuit decision in *Cole* and the subsequent Eleventh Circuit decision in *Chandler II*, or *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) ("*Chandler I*"), as reinstated in *Chandler II*. *Cole* involves a California public school graduation ceremony in which the school district retained plenary control over the ceremony, to include faculty advisers working with student

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6. *See Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied* 454 U.S. 863, 102 S. Ct. 322 (1981) ("*Collins*") (presentation by students of prayer and bible verses at the opening of student assembly violates the Establishment Clause); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (school district restriction on high school teacher's discussions with students about religion during school day and attempts to teach creationism held valid district regulation of curriculum); *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), *rehearing and en banc review denied*, 183 F.3d 538 (school board may not begin meetings with invocation); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (district employees and students participating in student prayers during basketball practices and games impermissible); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (school district order requiring fifth grade teacher refrain from reading bible in presence of students and remove religious books made available to students from classroom library held permissible); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (district practice of opening football games with prayer unconstitutional).

speakers and prior administrative approval of all speech. *Cole*, 228 F.3d at 1096-1097, App. A at A4-A6, App. J at J10-J21.[7] In both *Chandler I* and *Chandler II* the Eleventh Circuit vacated portions of what it considered an overbroad permanent injunction issued by the trial court:

> [W]hich assumed that virtually any religious speech in schools is attributable to the State. While the district court recognized that a student must be allowed to pray silently while in school, or even discuss his religious beliefs quietly with others, it enjoined the school district from permitting any prayer in a public context at any school function. We held that this injunction was overbroad to the extent that it equated all student religious speech in any public context at school with State speech. In so doing, it eliminated any possibility of private student religious speech under any circumstances other than silently or behind closed doors. This the Constitution neither requires nor permits. *Chandler II*, 230 F.3d at 1316 (footnote omitted) (emphasis omitted).

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7. This Court has itself recognized that educators retain a significant degree of control over all aspects of a public high school graduation ceremony stating that: "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise *contents of* the program, *the speeches*, the timing, the movements, the dress, and the decorum of the students." *Lee*, 505 U.S. at 597 (emphasis added). Other federal circuits have emphatically held a public high school graduation ceremony is a "nonpublic" forum. *Black Horse Pike*, 84 F.3d at 1478; *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d at 822, *affirmed on other grounds*.

The Eleventh Circuit in *Chandler II* repetitiously recognized this Court's holding in *Santa Fe Indep. Sch. Dist.* that State-sponsored coercive speech is forbidden by the Constitution, and so in distinguishing private speech did not rule upon official public school-sponsored activities such as a graduation ceremony.[8] In *Chandler I*, the Eleventh Circuit did recognize that: "On the other hand, even genuinely student-initiated religious speech may constitute state action if the State participates in *or supervises the speech*." *Chandler I*, 180 F.3d at 1264 (emphasis added and omitted) (citation omitted). The Eleventh Circuit concluded that:

> Furthermore, a student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for

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8. The Eleventh Circuit stated, "*Santa Fe* is limited to the issue of school-sponsored student speakers over public address systems at official school events. The activities prohibited by the Permanent Injunction entered in *Chandler I* are far more extensive." *Chandler II*, 230 F.3d at 1315, n. 2. "Because the prayers [in *Santa Fe*] bear the imprint of the State, they cannot be characterized as 'private' speech protected by the Free Exercise and Free Speech Clauses." *Id.* at 1315.

> The Court [in *Santa Fe*] held: [¶] The delivery of such a message — over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as "private" speech. [¶] Since the religious speech produced by Santa Fe's policy is sponsored by and, therefore, attributable to the school, it constitutes an unconstitutional endorsement of religion by the State.

Id. at 1315-16 (citations omitted) (emphasis omitted).

> converting his audience. ***The Constitution requires that schools permit religious expression, not religious proselytizing***. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." ***Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. Chandler I***, 180 F.3d at 1265 (citations omitted) (emphasis added).

Thus, the Eleventh Circuit in *Chandler I* and *Chandler II* repetitiously recognized the distinction between genuinely private student speech, and speech sponsored by the school during official school activities. The Eleventh Circuit in *Chandler I* itself recognized the Constitution prohibits proselytizing student speech from the government's pulpit. Whatever the merits, or breadth of *Chandler I* and *II*, neither decision extends to proselytizing speech during public high school graduation ceremonies over which a public school district retains plenary control. There is no split among the circuits, or between the Eleventh and Ninth Circuits in *Chandler* and *Cole* regarding graduation ceremonies.

B. Equitable Claims Remain Moot and No Petitioner Has Equitable Relief Standing.

Due to the clear-cut mootness and lack of standing to pursue equitable remedies, the only conceivable issues presented by this matter involve damage claims and immunities. The mootness and standing rulings of the trial and appellate courts were in accord with this Court's and

previous Ninth Circuit precedent.[9] *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S. Ct. 1660 (1983); *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOL) Inc.*, 528 U.S. 167, 120 S. Ct. 693, 703, 704 (2000); *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978 (1998); *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S. Ct. 2868 (1976); *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364 (1991); *Bigelow v. Virginia*, 421 U.S. 809, 816-817, 95 S. Ct. 2222 (1975). It has now been almost three years since Chris Niemeyer, and two years since Jason Niemeyer, graduated from Oroville High School. Each has long ago lost any personal stake in equitable relief pursuant to existing precedent. Moreover, it is entirely speculative whether any of the underclass students who seek now to join the case will even attend or speak at a graduation ceremony in the School District.

Petitioners do not squarely offer a "question presented" which raises such a momentous change in mootness and standing law, but only by footnote obliquely invite this Court to consider declaratory or injunctive relief and grant standing on *jus tertii* status to a variety of Petitioners. *Petition* at 1, n.1; 7, n.5. Consideration of these equitable or standing issues now would open the federal courthouse doors for the nation's high school alumni to maintain equitable relief claims, or

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9. *See B.C. by and through Powers v. Plumas Unified Sch. Dist.*, 192 F.3d 1260 (9th Cir. 1999), *amended* by 1999 WL 958926 (hereinafter "*B.C.*"); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated and remanded*, 177 F.3d 789 (9th Cir. 1999) *opinion withdrawn, review, or rehearing granted*, 1999 U.S. App. LEXIS 5051 (9th Cir. 1999); *Ceniceros by & through Risser v. Board of Trustees*, 106 F. 3d 878, 879, n.1 (9th Cir. 1997); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *cert. granted, vacated, and remanded*, 515 U.S. 1154, 115 S. Ct. 2604 (1995), *on remand*, 62 F.3d 1233.

assert *jus tertii* to maintain causes of action on behalf of younger students, for years after graduation from high school. This procedural invitation by Petitioners could prove more troubling for the nation's schools than perhaps even the substantive issues proferred to this Court.

C. There Is No Basis to Revive Damage Claims in this Matter.

The School District respectfully asserts the trial and appellate courts properly ruled the School Officials and School District board members named as individuals had qualified immunity to any 42 U.S.C. § 1983 damage claim. The first question is whether the plaintiff alleged facts which, if true, would constitute a deprivation of a constitutional right at all. *Cole*, 228 F.3d at 1101, App. A at A15; *see Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982) ("*Harlow*"); *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1714 (1998) ("*County of Sacramento*"); *Wilson v. Layne*, 526 U.S 603, 609, 119 S. Ct. 1692 (1999) ("*Wilson*"); *B.C.*, 192 F.3d at 1265, 1268. Second, unless there is a violation of a "clearly established" right which any reasonable person would have known at that time, a school official has qualified immunity and cannot be held accountable for damages. *Cole*, 228 F.3d at 1101, App. A at A15; *see Wilson*, 526 U.S. 603; *Brewster v. Board of Educ.*, 149 F.3d 971, 976-977 (9th Cir. 1998) ("*Brewster*"); *B.C.*, 192 F.3d at 1268; *McDade v. West*, 223 F.3d 1135, 1142 (9th Cir. 2000).

1. There Was No Potential Deprivation of Constitutional Rights in These Circumstances.

Pursuant to the first prong of the applicable *County of Sacramento* test, the School District respectfully asserts this matter could not involve a deprivation of a constitutional right at all, within the First Amendment "contours of the right." *County of Sacramento*, 523 U.S. 833 at 841, n.5. This Court has consistently expressed the need for particular Establishment Clause vigilance in K-12 public schools. *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 107 S. Ct. 2573 (1987) ("*Edwards*"); *Lee*, 505 U.S. at 592. This Court, in two bedrock decisions, held that State-sponsored prayer during the school day impermissibly violates the Establishment Clause of the First Amendment. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) ("*Abington*"); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) ("*Engel*"). Following *Abington* and *Engel*, this Court has consistently disallowed other forms of public religious expression in the context of public schools. *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (posting of the Ten Commandments on classroom wall impermissible); *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985) (moments of silence for meditation or voluntary prayer during class impermissible); *Edwards*, 482 U.S. 578 (law requiring teaching of creationism in public schools impermissible). In *Lee*, 505 U.S. at 587, this Court declined the opportunity to abandon this thirty years of precedent, and the basic tripartite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971) ("*Lemon*"), to reaffirm reliance upon precedent when reviewing public school Establishment Clause issues. *Lee*, 505 U.S. at 587. This Court specifically noted in *Lee* that "our decisions in *Engel v. Vitale* . . . and *Abington v. Schempp* . . . require us to distinguish the public school

context [from other civil ceremonial occasions]." *Id.* at 597 (citations omitted). Just last term this Court reaffirmed these bedrock public school principles in *Santa Fe Indep. Sch. Dist.*

All controlling precedent from this Court (and the circuits) has disallowed religious prayer, or similar forms of religious speech or exercises, in official public school-sponsored activities.[10] The Ninth Circuit decision in *Cole* carefully applied this Court's decisions in *Lee*, *Santa Fe Indep. Sch. Dist.*, and both the "endorsement" and "coercion" variations of the *Lemon* test to affirm Respondents' qualified immunity. *Cole*, 228 F.3d at 1101-1105, App. A at A14-A23. There is no reason for this Court to take this matter now.

2. There Was No "Clearly Established" Right During the Time Period At Issue.

The second prong of the *County of Sacramento* test provides the ultimate ground for denying the Petition. In this case, there was no established constitutional right of which the individually named defendants *should have known at that time*. In *Wilson*, 526 U.S 603, this Court held that

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10. The School Officials also had a compelling State interest in compliance with the California Constitution, Article I, Section 4; Article XVI, Section 5; and Article IX, Section 8 during public high school graduation ceremonies. *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied* 505 U.S. 1218, 112 S. Ct. 3026 (1992) (no religious invocations delivered by clergy during graduation ceremonies); *Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987) (no religious invocations by students during graduation ceremonies).

although the plaintiff's rights under the Fourth Amendment were violated by federal law enforcement officials, the officers were nonetheless entitled to the defense of qualified immunity since the state of the law was not clearly established at the time the search took place. *Wilson*, 526 U.S. at 605-606. This Court in so ruling followed its previous reasoning in *Harlow*, and also looked to the definition of "clearly established" articulated in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987) ("*Anderson*"); *Wilson*, 526 U.S. at 614. In *Anderson*, this Court held "clearly established" for the purposes of qualified immunity means that:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent. *Anderson*, 483 U.S. at 640 (citations omitted).[11]

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11. *See Brewster*, 149 F.3d at 976-980 ("The legal right at issue is not the generic right to free speech"); *B.C.*, 192 F.3d at 1265, 1288 (claimed constitutional deprivation must be apparent at the time of the alleged deprivation to be actionable); *Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 736-737 (7th Cir. 1994) ("The plaintiff bears the burden of showing that the constitutional right allegedly violated was clearly established before the defendant acted or failed to act"); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) ("[government] [o]fficials are not liable for bad guesses in gray areas").

The School Officials' decisions were in compliance with the First Amendment Free Speech Clause's *Hazelwood* standards, and were dictated by the line of federal and state Establishment Clause decisions barring State-sponsored religious expression in school. There was no U.S. Supreme Court or federal circuit case law setting forth any right to deliver a sectarian or proselytizing religious expression in a graduation ceremony. If this is arguably a case of first impression involving proposed religious expression in educator-approved student graduation speech, there could be no official knowledge of a "clearly established" federal constitutional right *at that time* sufficient to abrogate the qualified immunity. *Harlow*, 457 U.S. 800; *County of Sacramento*, 523 U.S. 833; *Wilson*, 526 U.S 603; *Anderson*, 483 U.S. 635; *see Brewster*, 149 F.3d 971; *B.C.*, 192 F.3d at 1268. In the context of immunity to damage claims, the question is not whether the Establishment Clause required the action, it is whether the School Officials with advice of counsel reasonably believed at that time their conduct was lawful. As this Court stated in *Wood v. Strickland*, 420 U.S. 308, 319-320, 95 S. Ct. 992 (1975): "the imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." Since there can be no damages due Petitioners, there is no reason for this Court to grant review to render what would truly be an advisory opinion.

D. The Contours of the Right for First Amendment Free Speech Analysis Must Include *Hazelwood*, Which Permits Administrative Limitations on Speech.

Petitioners attempt to side-step *Hazelwood* in their First Amendment "questions presented." Even assuming arguendo this Court found the School Officials' decisions were not required by the Establishment Clause as sought by the Petitioners, and that the decisions were not reasonable "good faith" attempts to comply with the Establishment Clause as found by the appellate court, those findings would not reverse the trial court's ruling that the School Officials were immune pursuant to Free Speech Clause and *Hazelwood* standards. Petitioners utterly fail to recognize their "questions presented" to this Court must include the *Hazelwood* standards for the purpose of Free Speech Clause analysis.

Students' First Amendment rights to free speech are protected to a more limited degree than adults in public schools. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969) ("*Tinker*"). Petitioners below grounded their Free Speech claims upon *Tinker*. However, this Court in *Tinker* noted that case did "not concern speech or action that intrudes upon the work of the schools *or the rights of other students*." *Id.* at 508 (emphasis added). *Tinker* recognized the special nature of public schools gives rise to "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507; *cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986) ("*Bethel*") (sanctions permissible for lewd and indecent student speech). This Court next differentiated between

student political protest and student expression in school-sponsored activities, holding that educators do not violate the First Amendment when exercising control over style and content of student speech in faculty-supervised activities so long as the educator's actions are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Speech sponsored by the school is thus subject to "greater control" by school authorities than speech not so sponsored. *Id.* at 272-73.[12] Thus, one affirmative defense of the Respondents below was that the School Officials' decisions were permissible pursuant to *Hazelwood*, 484 U.S. 273.

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12. Petitioners attempt to buttress their First Amendment "questions presented" by citing School District policy 5145.2 regarding student expression. *Petition* at 2-4. Such a policy is required by California Education Code section 48907 and concerns student expression in official publications. *See id.* California Education Code section 48907 has been construed by a state appellate court to allow the "prior restraint" of student expression in a student-produced film. *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302, 40 Cal. Rptr. 2d 762 (1995) ("*Lopez*"). The state appellate court in *Lopez* concluded that "official school publications" in California fall into the limited forum category, and that the prior restraint could be justified by advancing a "compelling state interest." *Id.* at 1328-29. Further, a state appellate court in *Perumal v. Saddleback Valley Unified Sch. Dist.*, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988) ("*Perumal*"), rejected the application of California Education Code section 48907 and "prior restraint" principles to the school district's prohibition of the distribution of religious literature on a "closed forum campus." *Perumal*, at 78-82, Crosby, J., dissenting. The state appellate court in *Bennett*, 193 Cal. App. 3d 1012, did not address any "prior restraint" issues when ruling student-delivered religious invocations unconstitutional on the grounds of the federal and state constitutions. There is no reason to bring these issues of California statutory and decisional law to this Court.

The School District's faculty advisors and School Officials' declarations attest to their ongoing duty to supervise and assist student speakers, as well as reasonable pedagogic concerns that speech be lawful, appropriate for the decorum of the graduation ceremony, and nonoffensive to the entire audience. *SER* at 36-38, 45-47, 48-50, 52-53, 54-56. The trial court correctly applied controlling First Amendment Free Speech Clause law and ruled the School Officials had a reasonable and legitimate pedagogical concern in not approving the proposed proselytizing valedictory testimonial in the context of a graduation celebration. *SER* at 253-257, App. C at C14-C17. The *Hazelwood* standards as applied to graduation ceremonies would therefore be included within any legal analysis involving the Free Speech Clause. However, there is no demonstrable need for this Court to address this settled law, and the Petition should again be denied.

E. Petitioners' Proposed Student Right to "Religious Invitation" Was Not Raised Below and is Contrary to Public School Precedent.

Petitioners suggest that this Court consider student "... preaching and religious invitations as fully protected First Amendment free speech activity...." *Petition* at 15. The First Amendment's Establishment Clause is applied with special vigilance in public schools. *Lee*, 505 U.S. 577. Petitioners' suggestion regarding State-sponsored public high school graduation ceremonies runs contrary to *Lee*, *Santa Fe Indep. Sch. Dist.*, and over thirty years of this Court's public school precedent. This sweeping legal theory of a student's "right to religious invitation" was not raised below at either the trial or appellate levels, where Petitioners relied instead upon *Tinker* and "viewpoint discrimination" theories.

Nor was it raised by petition for rehearing or rehearing en banc. Respondents respectfully assert this Court should not consider it now. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319, 119 S. Ct. 1961 (1999) (argument was neither raised nor considered below, and Court declines to consider it); *N.C.A.A. v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924 (1999) (Court will not decide in the first instance issues not decided below); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54, 119 S. Ct. 685 (1999) (Court expressed no opinion as to the factual correctness of new claims and instead left resolution to courts below on remand).

The line of cases now relied upon by Petitioners are not on point to K-12 public schools. *Petition* at 13-15.[13] Further, this line of reasoning ignores the reality that school audiences are compelled by law, or are at least invited by the State to activities involving peer pressure to attend, observe, or participate. *Lee*, 505 U.S. at 592-593, *Santa Fe Indep. Sch.*

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13. No case involves compulsory attendance or audiences gathered by the State in K-12 public schools. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940), plaintiffs challenged a Connecticut statute that prohibited the solicitation of money for religious, charitable, or philanthropic causes without the approval of the State's Secretary of the Public Welfare Council. In *Fowler v. Rhode Island*, 345 U.S. 67 73 S. Ct. 526 (1953), plaintiffs were found guilty of violating a city ordinance for addressing a religious meeting in a public park. Neither *Cantwell* nor *Fowler* were cited to the Ninth Circuit. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510 (1995) ("*Rosenberger*"), involved religious university students' access to university facilities and publications on a nondiscriminatory basis. Petitioner did raise *Rosenberger* regarding "viewpoint discrimination," but never asserted a high school student's "right to religious invitation."

Dist., 120 S. Ct. at 2280. Access cases such as *Rosenberger*, 515 U.S. 819, bear no resemblance to graduates and parents assembled for a public high school graduation ceremony under the plenary control of the School District. In both school contexts[14], and nonschool contexts,[15] this Court has

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14. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461 (1948) (compulsory legal attendance at school creates captive audience); *Bethel*, 478 U.S. at 684 (Court noted in pertinent part that: "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children — *especially in a captive audience* — from exposure to sexually explicit, indecent, or lewd speech") (emphasis added); *Edwards*, 482 U.S. at 584 ("[s]tudents in such institutions [public schools] are impressionable and their attendance is involuntary") *accord*; *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (students as captive audience justifies predistribution review of student leaflets); *Berger v. Rennselaer Cent. Sch. Corp.*, 982 F.2d 1160 (1993) (no distribution of Gideon Bibles to captive audience of students—distinguishing *Widmar v. Vincent*, 454 U.S. 263 (1981)); *Collins*, 644 F.2d 759 (invalid policy of prayer at school assemblies).

15. *Hurley v. Irish-American Gay & Lesbian & Bisexual Group*, 515 U.S. 557, 115 S. Ct. 2338 (1995) (right to speak encompasses right not to speak); *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714 (1974) (upholding ban on political advertisements in rapid transit cars); *Frisby v. Schultz*, 487 U.S. 474, 487-88, 108 S. Ct. 2495 (1988) (upholding antipicketing ordinance involving a doctor held "captive" in his residence due to picketing on a public street outside his home); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 771, 772-73, 114 S. Ct. 2516 (1994) (upholding injunction against loud picketing involving patients held captive by circumstances of medical treatment); *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 738, 90 S. Ct. 1484 (1970) (addressee may elect not to receive further material from a particular sender because "no one has a right to press even 'good' ideas on an unwilling recipient"); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 98 S. Ct. 3026 (1978) (upholding administrative order directed against broadest of scatological monologue).

consistently respected the rights of "captive audiences" to be free from intrusive speech. This Petition presents no factual or legal grounds for this Court to now consider Petitioners' sweeping change in the First Amendment as applied to the nation's public schools — particularly when the matter is procedurally limited to the reimposition of damage claims against the School Officials for allegedly violating a preexisting "clearly established" right.

CONCLUSION

The Petitioners have asserted no ground in either case law or policy to grant review. The Graduates' legal theories, if adopted, would discard settled public school precedent from this Court and the federal circuits, thereby sweeping away decades of substantive and procedural jurisprudence. Equitable disputes would continue long after an alumni has graduated from high school. 42 U.S.C. § 1983 damage litigation would escalate from either supporters or opponents of student religious testimonials, witnessing, or preaching in official public school events. Educators caught in the middle between competing claims would be at constant risk of personal liability when either exercising permissible pedagogic judgment pursuant to the Free Speech Clause, or enforcing the limitations of the Establishment Clause, for the benefit of all students and parents.

Respectfully submitted,

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